

105
Vol. I

195244
SC
TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 2

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

No. 56

KELLOGG COMPANY, PETITIONER,

vs.

NATIONAL BISCUIT COMPANY.

**ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE THIRD CIRCUIT.**

PETITIONS FOR CERTIORARI FILED { **SEPTEMBER 10, 1937.**
MAY 23, 1938.

CERTIORARI GRANTED MAY 31, 1938.

TRANSCRIPT OF RECORD

(IN FIVE VOLUMES)

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 5801.

October Term, 1935.

NATIONAL BISCUIT COMPANY,

Plaintiff-Appellant,

v.

KELLOGG COMPANY,

Defendant-Appellee.

Volume I.

PLEADINGS AND TESTIMONY.

(Pages 1 to 698 inclusive)

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Filed August 10, 1935.

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1—	Carton of Shredded Wheat, Witness Wallace	I	246
2—	Book Containing Samples of Cartons, Witness DeWeese	I	574	Not printed	
3—	Book Containing Sample of Cartons, Witness DeWeese	I	574	Not printed	
4—	Book Containing Sample of Cartons, Witness DeWeese	I	574	Not printed	
5—	Kellogg Package, Waitress 172/8/11/32, Biltmore Hotel, Providence, Witness Sweet	I	326	...	...
6—	Restaurant Check, Paid September 2, 1932, Biltmore Grill Room, Providence, Witness Sweet	I	327	Not printed	
7—	Kellogg Package, Delivered September 2, 1932, Biltmore Hotel, Providence, Witness Sweet	I	327	...	...
8—	Menu, September 2, 1932, Providence, Biltmore Hotel, Witness Sweet	I	327	Not printed	
9—	Kellogg Carton, Served, Biltmore Hotel, Providence, September 1, 1932, Witness Sweet	I	328	IV	1
10—	Old Style Carton, Shredded Wheat, Witness Schapansky (Saucer With Two Biscuit)	II	720*	IV	3
11—	Kellogg Package, Grocery, Hamilton, Mass., Witness Sanborn	I	359*	IV	7
12—	Kellogg Carton, Hawthorne Hotel, Salem, Mass., Witness Barrett	I	361*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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13—	Menu, Hawthorne Hotel, Salem, Mass., Witness Barrett	I	361*	Not printed	
14—	Kellogg Package, Grocery, Salem, Mass., Witness Creedon	I	364*
15—	Kellogg Carton, Grocery, Castle Hill, Sa- lem, Witness McCabe	I	366*	...	...
16—	Kellogg Package, Biltmore Hotel, Provi- dence, Witness Doyle	I	388*	...	...
17—	Menu, Biltmore Hotel, Providence, Wit- ness Doyle	I	388	Not printed	
18—	Large Kellogg Carton or Case, Burlington Grocery, Burlington (Photograph to Be Substituted), Witness Sharpley	I	400*	...	...
19—	Individual Kellogg Carton, Vermont Lunch, Burlington, Witness Thayer ..	I	406*	...	...
20—	Menu, Montpelier Tavern, Burlington, Vt., Witness Bradbury	I	408*	Not printed	
21—	Individual Box Shredded Wheat With Kel- logg's Whole Wheat Biscuit Therein, Dorn's Cafe, Burlington, Vt. Witness Bradbury	I	409*	...	...
22—	Menu, Vermont Lunch, Burlington, Vt., Witness Bradbury	I	409*	Not printed	
23—	Sales Slip, Duritsky's, Uniontown, Pa., Witness White	I	423	Not printed	
24—	Kellogg Carton, Duritsky's, Uniontown, Pa., Witness White	I	423	...	...
25—	Sales Slip, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I	427	Not printed	
26—	Kellogg Carton, H. L. Black Grocery, Juniata, Pa., Witness Colliflower	I	427	...	...
27—	Sales Slip, Huber's Grocery, Altoona, Pa., Witness Goodman	I	430	Not printed	

*Formal offer and admission of exhibit in evidence deleted in con-
der record.

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28—	Kellogg Carton, Huber's Grocery, Altoona, Pa., Witness Goodman	I	430
29—	Sales Slip, Witherow Store, Altoona, Pa., Witness Miller	I	433	Not printed	
30—	Kellogg Carton, Witherow Store, Altoona, Pa., Witness Miller	I	433	...	...
31—	Kellogg Carton, Isaly's Dairy, Steubenville, Ohio, Witness Trescher	I	445	...	...
32—	Kellogg Carton, Restaurant, East Liberty, Witness Borneman	I	446	...	...
33—	Kellogg Box With Paper Attached, Isaly's Dairy, Steubenville, Ohio, Witness Keeder	I	451	...	...
34—	Kellogg Carton, Kresge's, Steubenville, Ohio, Witness Keenan	I	452	...	...
35—	Strip Display Sign, Showing Dish Containing Two Biscuit, Witness Nubermeyer	I	454	Not printed	
36—	Glass Bowl, Witness Nubermeyer	I	454	...	...
37—	Kellogg Carton, Restaurant, Cleveland, Ohio, Witness Fisher	I	463	...	...
38-A—	Order Slip, Hammer Grocery, Cleveland, Witness Herron	I	464	Not printed	
38-B—	Kellogg Box, Hammer Grocery, Cleveland, Witness Herron	I	464
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39-B—	Kellogg Carton, Norris Grocery, E. Cleveland, Witness Lansdowne	I	466
40-A—	White Slip, Grocery, Lakeview Road, Cleveland, Witness Lansdowne	I	467	Not printed	
40-B—	Kellogg Box, Grocery, Lakeview Road, Cleveland, Witness Lansdowne	I	467	...	...
41-A—	Yellow Sales Slip, Bob's Grocery, Cleveland, Witness Schneider	I	469	Not printed	

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41-B	Kellogg Carton, Bob's Grocery, Cleveland, Witness Schneider	I	469
42-A	Sales Slip, "Y" Grocery, Cleveland, Witness Stibeling	I	470	Not printed	
42-B	Kellogg Carton, "Y" Grocery, Cleveland, Witness Stibeling	I	471	...	...
43	Carton, Kellogg's, Huff Restaurant, Cleveland, Witness Rohn	I	472	...	...
44	Kellogg Carton, Grocery Store, Detroit, Witness Bernard	I	481	...	...
45	Kellogg Carton, Cafe, Flint, Mich., Witness Harris	I	482	...	...
46	Kellogg Carton, Grocery Store, Detroit, Witness Yorke	I	483	...	...
47	Kellogg Carton, Grocery Store, Flint, Mich., Witness McClellan	I	485	...	...
48	Kellogg Carton, Grocery Store, Flint, Mich., Witness Molloure	I	486	...	...
49	Kellogg Carton Victory Lunch, Detroit ..	I	490	...	...
50-A	Brown Paper Bag, Grocery Store, Detroit, Witness Cowles	I	492	...	...
50-B	Kellogg Carton, Grocery Store, Detroit, Witness Cowles	I	492	...	...
51	Kellogg Carton, Grocery Store, Detroit, Witness Westphal	I	493	...	...
52	G. & H. McMillan's Catalog, Detroit, Witness MacElroy	I	494	Not printed	
53-A	Slip, Menu Card, Restaurant, Chicago, Witness Michalak	I	499	Not printed	
53-B	Kellogg Carton, Restaurant, Chicago, Witness Michalak	I	499	...	...
54	Kellogg Carton, YMCA, Chicago, Witness Loughlin	I	502	...	...
55-A	Card, on Counter, Restaurant, Chicago, Witness Holmer	I	504	Not printed	

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55-B—	Kellogg Carton, Restaurant, Chicago, Witness Holmer	I	504
56—	Menu Card, Restaurant, Chicago, Witness Holmer	I	504	Not printed	
57—	Kellogg Carton, Grocery Store, Chicago, Witness Ristig	I	512	...	...
58—	Kellogg Carton, Food Shop, Chicago, Wit- ness Korsen	I	513	...	...
59—	Kellogg Carton, Grocery Store, Chicago, Witness Rachlin	I	515	...	...
60—	Kellogg Carton, Grocery Store, Chicago, Witness Ritter	I	516	...	...
61—	Kellogg Package, Grocery Store, Chicago, Witness Golden	I	517	...	...
62—	Kellogg Box, Davie's Lunch, Chicago, Witness Skewes	I	520	...	...
63—	Kellogg Carton, Restaurant, Washington, D. C., Witness Kleeman	I	528	...	...
64—	Kellogg Carton, Grocery Store, Hagers- town, Md., Witness Schmidt	I	533	...	...
65—	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
66—	Bill From Restaurant, Hagerstown, Md., Witness Schmidt	I	533	Not printed	
67—	Kellogg Box, Restaurant, Hagerstown, Md., Witness Schmidt	I	533	...	...
68—	Bill, Marked One Box Shredded Wheat, Grocery Store, Chambersburg, Pa., Wit- ness Ludwig	I	534	Not printed	
69—	Kellogg Box, Grocery Store, Chambers- burg, Pa., Witness Ludwig	I	535	...	...
70—	Bill From Restaurant, Chambersburg, Pa., Witness Ludwig	I	535	Not printed	
71—	Kellogg Box, Restaurant, Chambersburg, Pa. Witness Ludwig	I	535

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72—Sales Slip From Restaurant, Baltimore, Witness Johnson	I	549*	Not printed	
73—Kellogg Carton, Restaurant, Baltimore, Witness Johnson	I	549*	...	...
74—Kellogg Package, Lull Grocery Store, Kal- amazoo, Mich., Witness Doyle	I	552*	...	...
75—Kellogg Carton, Sunshine Grocery Com- pany, Kalamazoo, Mich., Witness Doyle	I	553*	...	...
76—Kellogg Package, Grocery Store, Kalama- zoo, Mich., Witness Doyle	I	553*	...	...
77—Kellogg Carton, Grocery Store, Kalama- zoo, Mich., Witness Doyle	I	553*	...	...
78—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I	553*	...	...
79—Kellogg Carton, Grocery Store, Battle Creek, Witness Doyle	I	554*	...	...
80—Kellogg Package, Grocery Store, South Norwalk, Conn., Witness Cavalier	I	612*	...	...
81—Purchase Slip, Grocery Store, Stamford, Witness Tuttle	I	614*	Not printed	
82—Kellogg Carton, Grocery Store, Stamford, Witness Tuttle	I	614*	...	...
83—Newspaper Schedules (Summary), Wit- ness DeWeese	I	571*	IV	11
84—Compilation of Numerous Sheets Entitled "Advertising and Promotional Expense in the United States, Canada, and Eng- land," Witness DeWeese	I	571*	IV	41
85—Paper, Letter From Walter H. Page, Wit- ness DeWeese	I	572*	IV	43
86—List of Publications Referring to Shredded Wheat, Witness DeWeese	I	572*	Not printed	
87 to 112—Books or Albums Containing Rec- ords of Shredded Wheat Advertising, Witness DeWeese	I	572*	Not printed	

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

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113—Kellogg Package, Grocery Store, New York, Witness Bender	I 618*
114—Sheets (Two), Figures From 1927 and 1928, Tables of Amounts Expended by Advertising Shredded Wheat, Witness Oliva	I 620*	IV 45
115—Sheets (Four), Showing Expenditures by Media From 1929 to 1932, Witness Oliva	I 620*	IV 48
116—Cut-out, Floor, Witness Oliva	I 621*	Not printed
117—Cut-out, Witness Oliva	I 621*	Not printed
118—Cut-out, Witness Oliva	I 621*	Not printed
119—Four Price Cards, Witness Oliva	I 621*	Not printed
120—Eight Carton Inserts, Witness Oliva	I 621*	Not printed
121—Window Poster, Witness Oliva	I 621*	Not printed
122—Three Sheet Poster, Witness Oliva	I 622*	Not printed
123—Shopping Bag, Witness Oliva	I 622*	... ..
124—Hanger Card, Witness Oliva	I 622*	Not printed
125—Hanger Card, Witness Oliva	I 622*	Not printed
126—Hanger Card, Witness Oliva	I 622*	Not printed
127—Price Card, Witness Oliva	I 622*	Not printed
128—Price Card, Witness Oliva	I 622*	Not printed
129—Four Broad-sides, Witness Oliva	I 622*	Not printed
130—Recipe Book, Witness Oliva	I 622*	Not printed
131—Restaurant Hanger, Witness Oliva	I 623*	Not printed
132—Restaurant Menu, Witness Oliva	I 623*	Not printed
133—Three Window Posters, Witness Oliva	I 623*	Not printed
134—Window Posters, Witness Oliva	I 623*	Not printed
135—Price Window Poster, Witness Oliva	I 623*	Not printed
136—Panel Poster, Witness Oliva	I 623*	Not printed
137—Postal Card, Witness Oliva	I 623*	Not printed
138—Letter and Circular Distributed With Free Samples of Shredded Wheat, Witness Oliva	I 623*	Not printed

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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139	Three Bundles of Sheets of Newspaper Schedules, Witness Oliva	I	624*	Not printed	
140	Kellogg Package, Restaurant, Newark, Witness Fagan	I	635*	...	...
141	Kellogg Package, Grocery Store, New York, Witness Mund	I	638*	...	...
142	Kellogg Package (in Part), Restaurant, Hampstead, Long Island, Witness Par- nell	I	641*	...	...
143	Kellogg Package, Grocery Store, Seaford, Witness Tuthill	I	643*	...	...
144	Kellogg Package, Grocery Store, Brook- lyn, Witness Evans	I	651*	...	...
145	Kellogg Box, Cafeteria, Brooklyn, Witness Evans	I	652*	...	...
146	Menu, Cafeteria, Brooklyn, Witness Evans	I	655*	Not printed	
147	Kellogg Box, Grocery Store, Witness Mc- Crum	I	656*	...	...
148	New Carton, National Biscuit Co., Wit- ness Oliva	I	657*	...	...
149	Transcript of Annual Sales of Shredded Wheat, Witness Dunlap	I	675*	IV	50
150	Combined Schedule of Advertising Ex- penditures, Witness Dunlap	I	675*	IV	51
151	Kellogg Carton, Cafeteria, New York, Witness MacKay	I	682*	...	...
152	Kellogg Package, Restaurant, Fresno, Cal- ifornia, Witness Schapansky	II	716*	...	...
153	Kellogg Package, Black's Package Store, Fresno, California, Witness Schapansky	II	717*	...	...
154	Kellogg Carton, Grocery Store, With Sales Slip, Fresno, California, Witness Scha- pansky	II	718*

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sensing record.

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154-A	Kellogg Carton, Hotel Berry, Coffee Shop, Sacramento, California, Witness Sowles	II	727*
155	Kellogg Carton, Grocery Store, Sacramento, California, Witness Sowles	II	727*	...	...
156	Menu Card, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	Not printed	
157	Kellogg Carton, Smith's Coffee Cup, Stockton, California, Witness Burkner	II	732*	...	...
158	Kellogg Carton, Foster's Lunch System, San Francisco, California, Witness Baird	II	736*	...	...
159	Kellogg Carton, Grocery, Berkeley, California, Witness MacCool	II	739*	...	...
160	Kellogg Carton and Purchase Slip, Miller's Store, Witness Fatjo	II	743*	...	...
161	Kellogg Package, Santa Clara, California, Witness Van Artsdale	II	767*	...	...
162	Menu, Steamship Line, Ross, California, Witness Mears	II	1196*	Not printed	
163	Menu, Ship Monterey, Ross, California, Witness Mears	II	1196*	Not printed	
164	Menu Card, Restaurant Owner, San Francisco, California, Witness Dubac	II	1235*	Not printed	
165	Kellogg Carton, Large Size, Burlingame, California, Witness West	II	1190*	...	...
166	Kellogg Carton, Burlingame, California, Witness West	II	1190*	...	...
167	Kellogg's Window Display Carton, Burlingame, California, Witness West ...	II	1191*	...	...
168	Kellogg's Window Display Carton, Burlingame, California, Witness West	II	1191*	...	...
169	Kellogg Carton, Restaurant Owner, Witness Lee	II	1255*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

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170—	Menu Card, With Paper Attached, Restaurant owner, Witness Fierstine	II	1259*	Not printed	
171—	Kellogg Carton, Witness Cooper	II	776*	...	...
172—	Kellogg's Wheel of Knowledge, San Diego, California, Witness Cooper	II	776*	Not printed	
173—	Kellogg Carton, Purchaser, San Diego, California, Witness Cooper	II	777*	...	...
174—	Kellogg Carton, Purchaser, Los Angeles, California, Witness MacFarland	II	783*	...	...
175—	Kellogg Carton, Los Angeles, California, Witness MacDuffie	II	787*	...	...
176—	Kellogg Carton, Purchaser, Los Angeles, California, Witness MacDuffie	II	787*	...	...
177—	Kellogg Carton, Purchaser, Glendale, California, Witness Anderson	II	792*	...	...
178—	Kellogg's Individual Carton, Witness Lierley	II	798*	...	...
179—	Kellogg Carton and Cash Slip, Witness Ruch	II	802*	...	...
180—	Clipping, Brownwood Bulletin, Kellogg Sales, Witness Wilde	II	1333*	Not printed	
181—	Fort Worth Grocery Co., Price-List, Witness Wilde	II	1339*	Not printed	
182—	Kellogg Carton, Witness Bullock	II	882*	...	...
183—	Kellogg Package, Witness Burke	II	884*	...	...
184—	Kellogg Carton, Cellophane Front, Witness Mahaffey	II	889*	...	...
185—	Kellogg Carton, Witness Tutt	II	900*	...	...
186—	Kellogg Carton, Witness Reynolds	II	902*	...	...
187—	Sales Slip, Witness Staloup	II	904*	Not printed	
188—	Kellogg Carton, Witness Staloup	II	904*	...	...
189—	Slip of Paper, Witness Hunsaker	II	907*	Not printed	
190—	Kellogg Carton, Witness Hunsaker	II	907*	...	...

*Formal offer and admission of exhibit in evidence deleted in condensing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
191—Kellogg Package, Witness Guthrie	II	936*	...	...
192—Kellogg Carton, Witness Guthrie	II	938*	...	...
193—Menu Card, Witness Guthrie	II	938*	Not printed	
194—Page of the Wichita Independent, Witness Guthrie	II	938	Not printed	
195—Kellogg Package, Witness Branson	II	943*	...	...
196—Purchase Slip, Witness Branson	II	943*	Not printed	
197—Page of the Winona Republican Herald, Dated January 20, 1933, Witness Kol- voord	III	1411*	Not printed	
198—Newspaper Advertisement of the Decatur Home Stores, Witness Kolvoord	III	1415*	Not printed	
199—Old-Style Kellogg Folder Cut, Witness Kolvoord	III	1415*	Not printed	
200—Newspaper Advertisement, Reading Eagle, April 28, 1932, Witness Kelly	III	1443*	Not printed	
201-A—Newspaper Clipping, Kalamazoo Ga- zette, Witness Mahan	III	1476*	Not printed	
201-B—Sheet, Containing Same, Kalamazoo Ga- zette, March 2, 1933; Newspaper Clip- ping, Witness Mahan	III	1476	Not printed	
202—Price-List Put Out by the Kellogg Com- pany, Dated February 1, 1933, Witness Mahan	III	1476*	IV	53
203—Paper Showing Picture of Kellogg's Whole Wheat Biscuit Containing Two Biscuit in a Dish to Be Addressed to Store Managers, Witness Mahan	III	1477	IV	55
204—Tear Sheet From the Battle Creek, Michi- gan, Moon Journal, October 21, 1932, Witness Mahan	III	1477	Not printed	
205—Hand-Bill Used by I. G. A. Stores, Wit- ness Mahan	III	1477	Not printed	

*Form:1 offer and admission of exhibit in evidence deleted in con-
densing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
206—Sheet From the News Telegraph, Dated March 10, 1933, Sharon, Pa., Witness Ander	III	1638		Not printed
207—Page Twenty-nine of the Pittsburgh Press, Dated March 25, 1932	III	1638		Not printed
208—Package of Hat Cleaner, Witness Rush ..	III	1727	...	...
209—Package of Camel Cigarettes, Witness Rush	III	1728	...	...
210—Copy of the Reading Eagle, May 5, 1932, Witness Miller	III	1846*		Not printed
211—Page of the Reading Eagle, February 4, 1932, Witness Miller	III	1846*		Not printed
212—Sheet Containing Ad of the Kellogg Com- pany of the Reading Eagle, May 12, 1932, Witness Miller	III	1846*		Not printed
213, 214—(Numbers Skipped, No Such Exhib- its Marked.)				
215—Package Resembling Plaintiff's Exhibit No. 166 (a Kellogg Shredded Whole Wheat Biscuit Carton), Witness Hop- kins	III	1871*	...	...
216—Package Resembling Plaintiff's Exhibit No. 165, Witness Hopkins	III	1872*	...	...
217—Cardboard Liner, Used by Kellogg Com- pany in Whole Wheat Biscuit Cartons, Witness Hopkins	III	1872*	...	...
218—Easel or Study Advertising, Witness Hop- kins	III	1874*		Not printed
219—Sheet of the Reading Eagle, March 31, 1932, Witness Hopkins	III	1875*		Not printed
220—Sheet of the Reading Eagle, March 5, 1932, Witness Hopkins	III	1875*		Not printed
221—Sheet of the Reading Eagle, March 17, 1932, Witness Hopkins	III	1875*		Not printed

*Formal offer and admission of exhibit in evidence deleted in con-
suing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
222—	Copy of Modern Merchant and Grocery World, Witness Hopkins	III 1875*	Not printed
223—	Cash-and-Carry Bulletin, Witness Hopkins	III 1875*	Not printed
224—	William Montgomery & Co., Price-List, Witness Hopkins	III 1876*	Not printed
225—	Copy of Modern Merchant and Grocery World, February 9, 1933, Witness Hop- kins	III 1876*	Not printed
226—	Standard Government Form of Bid, Wit- ness Hopkins	III 1879	Not printed
227—	Price Bulletin of Provisional Contracts, Witness Hopkins	III 1879	Not printed
228—	Copies of Requisitions, Consisting of Six Sheets, Witness Ruckman	III 1912*	Not printed
229—	Advertisement, Minneapolis Journal, April 30, 1932, Witness Ruckman	III 1940*	Not printed
230—	Breakfast Menu, Hotel Paxton Coffee Shop, Witness Dubois	III 1947*	Not printed
231—	Menu, Main Dining-Room, Hotel Paxton, Witness Dubois	III 1947*	Not printed
232—	Room-Service Menu, Hotel Paxton, Wit- ness Dubois	III 1947*	Not printed
233—	Board of Control Specifications, Wit- ness Sawyer	III 1965*	Not printed
234—	Consolidation Agreement, Dated May 19, 1890, Witness Malone	II 958*	Not printed
235—	Copy of Certificate of Incorporation, Dated May 7, 1900, Witness Malone	II 978	Not printed
236—	Letter, Division Passenger Agent, Atchi- son, Topeka & Santa Fe Railway Co., April 13, 1933, Witness Malone	II 979	Not printed
237—	Certified Copy Resettled Final Decree in Shredded Wheat Company Against Humphrey Cornell Company	III 2005	IV 57

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

PLAINTIFF'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
238—Menu Card, The Fenway Inn	I	251	Not printed	
239—Photographs (24), Illustrating Plaintiff's Operations	I	271	IV	63
240—Box Diamond-Shape Biscuit	I	271	Not printed	
240-A—Photograph of Two Biscuit of Plain- tiff's Exhibit No. 240	III	2019	IV	111
241—Box of Cone-Shaped Biscuit	I	272	...	
241-A—Photograph of Four Biscuit of Plain- tiff's Exhibit No. 241	III	2019	IV	113
242—Box of Doughnut-Shaped Biscuit	I	273	...	
242-A—Photograph of Two Biscuit of Plain- tiff's Exhibit No. 242	III	2019	IV	115
243—Box of 3-inch Round-Cut Biscuit	I	274	...	
243-A—Photograph of Two Biscuit of Plain- tiff's Exhibit No. 243	III	2019	IV	117
244—Box of 2-inch Round-Cut Biscuit	I	274	...	
244-A—Photograph of Three Biscuit of Plain- tiff's Exhibit No. 244	III	2019	IV	119
245—Box of 3-inch Round-Moulded Biscuit ..	I	275	...	
245-A—Photograph of Two Biscuit of Plain- tiff's Exhibit No. 245	III	2019	IV	121
246—Box of Biscuit Baked in Automatic Ma- chine	I	276	...	
247—Sheet Tampa Morning Tribune, July 9, 1932	I	303	IV	123
248—Sheet The Tampa Daily Times, July 8, 1932	I	303	IV	125
249—Sheet The Saint Paul Pioneer Press, April 26, 1933	I	304	Not printed	
250—Digest of Style for Government Printing..	I	304*	...	
251—Stipulation Re Depositions, in Connecticut Case	I	306	IV	127
252—Four U. S. Trade-mark Registrations of Plaintiff	I	315	IV	129

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

PLAINTIFFS EXHIBITS—Continued

Ex. No.		Admitted		Printed	
		Vol.	Page	Vol.	Page
	No. 85,186, January 30, 1912	I	315	IV	129
	No. 178,725, January 15, 1924	I	315	IV	133
	No. 216,593, August 17, 1926	I	315	IV	131
	No. 213,456, May 25, 1926	I	315	IV	135
253	—Twenty-seven State Registrations of Trade-mark Shredded	I	315		Not printed
254	—Certificate of Incorporation, Natural Food Co.	II	1004		Not printed
255	—Certified Court Order Supreme Court, New York, Authorizing Change of Name to Shredded Wheat Company...	II	1005		Not printed
256	—Certificate of Organization National Bis- cuit Co.	II	1005		Not printed
257	—Amendment of Charter of National Bis- cuit Co.	II	1005		Not printed
258	—Second Amendment of Charter of National Biscuit Co.	II	1005		Not printed
259	—Third Amendment of Charter of National Biscuit Co.	II	1005		Not printed
260	—Bill of Sale, 30th April, 1930, From Shred- ded Wheat Company to National Biscuit Co.	II	1005		Not printed
261	—Carton Purchased at Kenosha on Decem- ber 24, 1932	III	2018		...
262	—Sketches A and B Used in Cross-Exam- ination of Witness Penty	II	1127		Not printed
263	—Report on Hot and Cold Cereals	II	1137		Not printed
264	—Report on Hot and Cold Cereals	II	1137		Not printed
265	—Slip Referred to by Witness Poole	II	1145		Not printed
266	—Package of Plaintiff's Reprocessed Bis- cuit	III	2018		...
267	—Package of Plaintiff's Reprocessed Bis- cuit	III	2018		...
268	—Package of Plaintiff's Biscuit, Part Re- processed	III	2018		...
269	—Bundle of Photographs	III	2018		Not printed

PLAINTIFF'S EXHIBITS—Continued.

Ex No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
70—Package Like Plaintiff's Exhibit 2, Kellogg's Shredded Whole Wheat Biscuit	III	2018	...	...
71—Defendant's Carton Put Out September, 1932	III	2018	...	...
72—Carton Kellogg's Shredded Whole Wheat	III	2018	...	...
73—Decree in Case of Natural Food Co. v. Bulkley, et al.	III	2020	Not printed	
74—Carton Champion Flake Butters	III	2024	...	...
75—Dupont Company Price-List on Cellophane	III	2036	Not printed	

PLAINTIFF'S EXHIBITS UNDER RULE 46.

A—Publication of the Cyrus Curtis Pub. Co.	III	2019	Not printed	
B—Opinion of the Court of Appeals in Williams Case	III	2020	Not printed	
C—Decree of Court of Appeals in Williams Case	III	2020	Not printed	

DEFENDANT'S EXHIBITS.

Ex. No.		Admitted		Printed	
		Vol.	Page	Vol.	Page
1—	Letter of Mr. Sweet	I	340		Not printed
2—	Letter of Mr. Sweet	I	340		Not printed
3-A—	Letter of Mr. Sweet	I	340		Not printed
3-B—	Letter of Mr. Sweet	I	340		Not printed
4—	Kellogg Carton, Witness Hamilton	I	357*		
5—	Kellogg Carton, Witness Hamilton	I	357*		
6—	Package Kellogg Whole Wheat Biscuit ..	I	495*		
7—	Slip of Witness' Signature Torn Off Plain- tiff's Exhibit No. 54, Witness Loughlin	I	502*		Not printed
8—	Box or Carton, Kellogg's, Witness Dodge	I	531*		
9—	Letter and Enclosure; News Release, Re: Suit Against Kellogg, Witness DeWeese	I	604	IV	137
10—	Newspaper Article, Filing of Suit by Shredded Wheat Company, Witness DeWeese	I	604	IV	138
11—	Quaker Muffetts Package, Witness Wein- stock	I	667*		
12—	Package, Codfish, Witness West	II	1194*		
13—	Package, Baker's Cocomat, Witness West	II	1194		
14—	Package, Kellogg's Whole Wheat Flakes, Witness West	II	1194*		
15—	Package, Kellogg's Muffetts, Witness West	II	1194		
16—	Triscuit Carton, Witness Powell	II	1266		
17—	Wheat Krumbles Carton, Witness Thomp- son	II	1275*		
18—	Poster, Wheel of Knowledge, Witness Thompson	II	1277*		Not printed
19—	Poster, Jumbo Kellogg Carton, Witness Thompson	II	1277*		Not printed
20—	Sheets, Ads, Witness Thompson	II	1278*		Not printed
21—	Kellogg's Corn Flakes, Witness Thompson	II	1285		
22—	Kellogg's All-Bran, Witness Thompson ..	II	1285		
23—	Kellogg's Pep, Witness Thompson	II	1285		

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
24—	Kellogg's Wheat Krumbles, Witness Thompson	II 1285	... ..
25—	Kellogg's Rice Krispies, Witness Thompson	II 1285	... ..
26—	Kellogg's Kaffee Hag, Witness Thompson	II 1285	... ..
27—	Kellogg's Wheat Krispies, Witness Thompson	II 1285	... ..
28—	(Number Skipped, No Such Exhibit Marked.)		
29—	Kellogg's Whole Wheat Flakes, Witness Thompson	II 1285	... ..
30—	Package of Tear Sheets From San Francisco and Oakland Papers	II 775*	Not printed
31—	Package of Kellogg's All-Bran, Witness Anderson	II 1339*	... ..
32—	Package of Post's Whole Bran, Witness Anderson	II 1339*	... ..
33—	Package of Uneeda Graham Crackers, Witness Anderson	II 1339*	... ..
34—	Package of Brown's Graham Crackers, Witness Anderson	II 1339*	... ..
35—	Package of Sunshine Dutch Rush, Witness Anderson	II 1339*	... ..
36—	Package of Holland Rusk, Witness Anderson	II 1339*	... ..
37—	Package of Brown's Vanilla Wafers, Witness Anderson	II 1339*	... ..
38—	Package of Uneeda Vanilla Wafers, Witness Anderson	II 1339*	... ..
39—	Package of Van Camp's Spaghetti, Witness Anderson	II 1340*	... ..
40—	Package of Thrift Spaghetti, Witness Anderson	II 1340*	... ..

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted		Printed	
		Vol.	Page	Vol.	Page
41—	Package of Swans Down Biscuit Mix, Witness Anderson	II	1340*	...	...
42—	Package of La France Biscuit Flour, Wit- ness Anderson	II	1340*	...	...
43—	Package of Uneeda Assorted Biscuit, Wit- ness Anderson	II	1340*	...	...
44—	Package of Sunshine Specialties Assort- ment, Witness Anderson	II	1340*	...	...
45—	Package of Baker's Cocanut, Witness An- derson	II	1340*	...	...
46—	Package of Premier Spaghetti, Witness Anderson	II	1340*	...	...
47—	Package of Van Camp's Kidney Beans, Witness Anderson	II	1340*	...	...
48—	Package of Premier Beans and Pork, Wit- ness Anderson	II	1340*	...	...
49—	Package of Van Camp's Spaghetti, Witness Anderson	II	1340*	...	...
50—	Package of LaChoy Shredded Sprouts, Witness Anderson	II	1340*	...	...
51—	Package of Van Camp's Hominy, Witness Anderson	II	1340*	...	...
52—	Package of Beech-Nut Pork and Beans, Witness Anderson	II	1340*	...	...
53—	Package of Battle Creek Fig and Bran, Witness Anderson	II	1340*	...	...
54—	Package of Van Camp's Hominy, Wit- ness Anderson	II	1340*	...	...
55—	Package of Beech-Nut Spaghetti, Wit- ness Anderson	II	1340*	...	...
56—	Package of Baker's Sweet Potato Shred- dlets, Witness Anderson	II	1340*	...	...
57—	Package of Dunham's Original Shred Co- coanut Witness Anderson	II	1340*	...	...

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted		Printed	
		Vol.	Page	Vol.	Page
58	Package of Baker's Coconut Shredded, Witness Anderson	II	1340*	...	...
59	Package of National Shredded Wheat Bis- cuit, the Larger Individual Carton, Witness Baskett	II	1342*	...	...
60	Package of National Shredded Wheat Bis- cuit, the Smaller Individual Carton, Witness Baskett	II	1342*	...	...
61	Photograph of the Interior of the Wyatt Self-Service Store, Witness Baskett ...	II	1344	Not printed	
62	Package of Post Toasties, Corn Flakes ...	II	905*	...	...
63	Package of Genuine Egg Noodles	II	905*	...	...
64	Postal Card of Clover Farms Store, Reads, "Valuable Coupon," Witness Walters ..	III	1402*	Not printed	
65	Jumbo Carton Display, Witness Kol- voord	III	1405*	...	...
66	Display Piece With Stand, Picturing a Sau- cer With Two Biscuit, Witness Kol- voord	III	1406*	...	...
67	Grocers' Display Piece Which Holds Car- ton Kellogg's Whole Wheat Biscuit, Witness Kolvoord	III	1406*	...	...
68	Sheet of Day Advertisements, Winona Re- publican Herald, January 20, 1933, Witness Kolvoord	III	1416	Not printed	
69-A and 69-B	Advance Sales Notice, Consist- ing of Two Sheets, Witness Chapelle..	III	1418*	Not printed	
70	Package, Kellogg's, Witness Hatfield ...	III	1444*	...	...
71	Package of Shredded Wheat, Witness Hat- field	III	1444*	...	...
72	Individual Kellogg Package, Witness Tyler	III	1446*	...	...
73	Mat, Used in Newspapers in Printing, Wit- ness Kolvoord	III	1449*	...	...

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
74—	M-nu, Referring to Kellogg Carton, Wit- ness Miller	III 1454	...
75—	Small Individual Kellogg Package, Wit- ness Gray	III 1529*	...
76—	Kellogg Individual Package, Witness Gray	III 1529*	...
77—	Older Package of Muffetts, Witness Lewis	III 1534*	...
78—	Newer Package of Muffetts, Witness Lewis	III 1534*	...
79—	Copy of Bid, Woman's Relief Corps Home, Witness Lewis	III 1536*	IV 142
80—	Kellogg Package	III 1631	...
81—	Shredded Wheat Package	III 1631	...
82—	Forty-inch Advertisement, Martins Ferry, Witness Ander	III 1632*	Not printed
83—	Large Set-up Window Photograph Display, Witness Ander	III 1633*	...
84—	A Smaller Set-up Window Photograph Dis- play, Witness Ander	III 1633*	...
85—	Copy of Bid, Tubercular Sanitarium, Cres- son, Pennsylvania (Department of Health)	III 1641*	Not printed
86—	Copy of Bid, Specifies Kellogg's Whole Wheat Biscuit, Tubercular Sanitarium, Cresson, Pa., Witness Ander	III 1642*	Not printed
87—	Copy of Bid, Pennsylvania Soldiers' and Sailors' Home, Witness Ander	III 1642*	Not printed
88—	Package, Rippled Wheat, Witness Bell ...	II 954	...
89 and 90—	Kellogg Deal Price Cards, Witness Mazman	III 1750*	...
91—	Ross Carton, Witness Withersell	III 1764*	...
92—	Chester Lowry's Blue Book Price List, Witness Bickham	III 1801*	Not printed
93—	Camden Price List, Lowry's Blue Book, Witness Bickham	III 1801*	Not printed

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
94—Advertisement From Reading Eagle, February 4, 1932, Witness Miller	III	1841*	Not printed	
95—Letters From National Biscuit Company to Jobbers, December 1, 1931, Witness Miller	III	1842*	IV	143
96 and 97—Two Circulars Carrying Advertisements of Kellogg's Whole Wheat Biscuit, Witness Moyer	III	1850*	Not printed	
96—Story Book of Games, Witness Hopkins ..	III	1863*	Not printed	
99—Wheel of Knowledge Chart, Witness Hopkins	III	1863*	Not printed	
100-A—File Copy of Standard Government Form of Bid, for Use by Navy Department, for Supply Department, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
100-B—Standard Government Form of Bid, by Navy Department, U. S. Navy Yard, Washington, D. C., Witness Hopkins ..	III	1866	Not printed	
101—Standard Form of Bid, Dated January 12, 1933, U. S. Naval Air Station, Lakehurst, N. J., Witness Hopkins	III	1866	Not printed	
102—Federal Standard Stock Catalogue, N-C-191, Witness Hopkins	III	1868	Not printed	
103—Small Kellogg Carton, Purchased on Dining Car, Northwestern Railroad	III	1944*	.....
104—Letter to the Kellogg Co. From the F. H. Cobb Co., Inc., Cortland, N. Y., Dated March 22, 1933, an Addendum to the Testimony of Mr. A. J. Twentyman ..	III	1952*	Not printed	
105—Case Used for Packing National Shredded Wheat, Witness Sawyer	III	1957*	.....
106—Sketch, Diagram of Threads, Witness Malone, Made by Mr. Clarke	II	963	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol. Page	Printed Vol. Page
107—Sketch Diagram of Threads, Made by Witness Malone	II 963*	Not printed
108—Photostatic Copy of Ad in the Denver Re- publican, Dated March 11, 1894, Wit- ness Hurd	II 974	IV 145
109—Certificate of Incorporation Colorado Shredded Wheat, January 25, 1895, Witness Hurd	II 977*	Not printed
110-A and 110B—Government Bid, Fort Logan, Dated April 11, 1933, Witness Copeland	III 1989*	Not printed
111—Package of Egypt Stick Candy	III 1990	...
112—Second Sheet, Page Five, Denver Times, March 17, 1894	III 1990	Not printed
113—Second Sheet, Page Five, Denver Times, March 10, 1894	III 1990	Not printed
114—Third Sheet, Page Eight, Daily News, Den- ver, Colorado, July 17, 1895	III 1990	Not printed
115—Fourth Sheet, Page Eight, Daily News, Denver, Colorado, July 14, 1895	III 1990	Not printed
116—Fifth Sheet, Page Eight, Daily News, Den- ver, Colorado, July 27, 1895	III 1990	Not printed
117—Sixth Sheet, Page Eight, Daily News, Denver, Colorado, July 7, 1895	III 1991	Not printed
118—Seventh Sheet, Page Eight, Daily News, Denver, Colorado, July 10, 1895	III 1991	Not printed
119—Eighth Sheet, Page Eight, Daily News, Denver, Colorado, July 28, 1895	III 1991	Not printed
120—Copy of Record in the Case of Shredded Wheat vs. The Humphrey Cornell Co. and Frederick H. Towne, Witness Ross	III 1992	Not printed
121—Photostatic Certified Copy of Majority Opinion in the U. S. Circuit Court of Appeals, Witness Ross	III 1992	IV 147
122—Copy of Petition for Rehearing, Witness Ross	III 1993	IV 159

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol. Page	Printed Vol. Page
12—Kellogg Carton Used From About 1910 to "1912, Witness Ross	III 1999*	... ..
13—Kellogg Carton Used From 1913 to 1914 to Some Time 1915 , Front Panel of Carton Entitled Kellogg's Toasted Wheat Biscuit, Witness Ross	III 2000*	... ..
13—Kellogg Carton Used From 1915 Until 1918 (About) or 1919, Front Face Reads "Copyright 1910 by Kellogg's Toasted Cora Flakes Co.," Witness Ross	III 2000*	... ..
16—Certified Copy of Manifest, Witness Ross	III 2005	IV 163
17—Shredded Wheat Company Chart, "Educa- tional Exhibit of Shredded Wheat Bis- cuit"	I 288*	Not printed
18—Book of Labels Illustrative of Jordan Tes- timony	II 1002	Not printed
19—Book of 1923 Newspaper Advertising	II 1003	Not printed
19-A—Book of 1928 Newspaper Advertising ...	II 1003	Not printed
19-B—Book of 1929 Newspaper Advertising ...	II 1003	Not printed
19-C—Book of 1930 Newspaper Advertising ...	II 1004	Not printed
19-D—Book of 1931 Newspaper Advertising ...	II 1004	Not printed
19-E—Book of 1932 Newspaper Advertising ...	II 1004	Not printed
130—Board Containing Samples of Defendant's "Carts, Marked A to R	II 1006	... ..
131—Holder Containing Kellogg Poster Adver- tising Before Suit Brought	II 1016	... ..
132—Packages Prepared by Witness Jordan ...	II 1016	... ..
133—Form Letter to Newspapers Re Kellogg Advertisements	II 1016	Not printed
134—Five Bundles of Retailer Advertisement of Kellogg's White Wheat Biscuit	II 1016	Not printed
135—Bundle of Retailer Advertisements of Kel- logg's Shredded Wheat Biscuit	II 1016	Not printed

* Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEPENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted Vol. Page	Printed Vol. Page
136—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II 1017	Not printed
137—Bundle of Retailer Advertisements of Kellogg's Shredded Wheat	II 1017	Not printed
138—Batch of Advertisements of Plaintiff	II 1025	Not printed
139—Odd Advertisements of Plaintiff in Woman's Home Companion	II 1035	Not printed
140—Plaintiff's Pamphlet "Uneeda"	II 1035	Not printed
141—Standard Government Form of Bid, Department of Interior	II 1043	Not printed
142—Federal Specification for Cereals (Breakfast Foods)	II 1043	Not printed
143—Defendant's Bid Naval Supply Department, Norfolk, Va., May 16, 1933	II 1044	Not printed
144—Defendant's Bid Naval Supply Depot, Norfolk, Va., March 15, 1933	II 1045	Not printed
145—Samples of Defendant's Early Advertisements of Kellogg's Toasted Wheat Biscuit	II 1047	Not printed
146—Early Carton of Kellogg's Shredded Whole Wheat Biscuit	II 1048	...
147—Blank Carton Sanitas Toasted Corn Flakes	II 1050	...
148—Advertisements Kellogg's Shredded Krumbles	II 1052	Not printed
149—Carton of Kellogg's Krumbles, Shredded Whole Wheat	II 1053	...
150—Carton Kellogg's Wheat Krumbles	II 1053	...
151—Carton Kellogg's Wheat Krumbles (U. S.)	II 1058	...
152—Letter May 3, 1933, N. A. Relfrich to Kellogg's Sales Co.	II 1059	Not printed
153—Proposal April 8, 1933, to Navy Purchasing Officer, New York	II 1060	Not printed
154—Price Bulletin of Provision Contract for May, 1933, Port of New York	II 1061	Not printed

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
15—Bid March 13, 1933, Navy Purchasing Office, New York	II	1062	Not printed	
16—Bid June 2, 1932, Naval Air Station, Lakehurst, N. J.	II	1062	Not printed	
17—Bid February 23, 1933, Selfridge Field, Mich.	II	1063	Not printed	
18—Bid May 9, 1933, West Point, N. Y.	II	1063	Not printed	
19—Invitation for Bid August 22, 1932, Veterans Administration Home, National Military Home, California	II	1064	Not printed	
20—Invitation for Bids, October 25, 1932, Veterans Administration, Washington, D. C.	II	1064	Not printed	
21—Invitation for Bids, October 25, 1932, U. S. Marine Hospital, St. Louis, Mo.	II	1064	Not printed	
22—Bid March 21, 1932, Fort Benjamin Harrison, Ind.	II	1065	Not printed	
23—Bid September 8, 1932, Fort Hoyle, Md. ...	II	1065	Not printed	
24—Invitation for Bids, May 19, 1932, U. S. Property and Disbursing Officer, Trenton, N. J.	II	1065	Not printed	
25—Bids January 9, 1932, The Army War College, Washington, D. C.	II	1065	Not printed	
26—Bid August 18, 1932, Fort Moultrie, S. C. ...	II	1066	Not printed	
27—Bid November 11, 1932, Langley Field, Va.	II	1066	Not printed	
28—Bid January 19, 1933, Fort Crook, Neb. ...	II	1066	Not printed	
29—Bid March 25, 1933, Fort McClellan, Ala. ...	II	1066	Not printed	
30—Bid April 4, 1932, Fort Mason, San Francisco, Cal.	II	1066	Not printed	
31—Bid July 21, 1931, Fort Warden, Wash.	II	1067	Not printed	
32—Bid July 13, 1932, Quartermaster Supply Officer, Brooklyn, N. Y.	II	1067	Not printed	
33—Bid Marine Barracks, Navy Yard, Portsmouth, N. H.	II	1068	Not printed	
34—Invitation for Bids, Pennsylvania Department of Health, Sanitarium No. 2, Cresson, Pa.	II	1068	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
175—Specification for Cereals, Pa., December 10, 1932	II	1069	Not printed	
176—Specifications State of South Dakota	II	1069	Not printed	
177—Request for Bids, December 19, 1932, Maine	II	1070	Not printed	
178—Proposal, Rockland State Hospital, Orangeburg, N. Y.	II	1070	Not printed	
179—Invitation for Bids, March 13, 1933, Tennessee	II	1070	Not printed	
180—Order April 1, 1933, Wassaic State School, Wassaic, N. Y.	II	1071	Not printed	
181—Order January 16, 1933, Newark State School, Newark, N. J.	II	1071	Not printed	
182—Order March 23, 1933, Great Meadow Prison, Comstock, N. Y.	II	1071	Not printed	
183—Order January 14, 1933, Willard State Hospital, Willard, N. Y.	II	1071	Not printed	
184—Specifications Division of Purchases and Supplies, Springfield, Ill.	II	1072	Not printed	
185—Individual Carton Kellogg's Whole Wheat Biscuit	II	1072	...	...
186—Large Carton Kellogg's Whole Wheat Biscuit	II	1072*	...	...
187—Menu Card, Chicago, Milwaukee, St. Paul and Pacific	II	1074	Not printed	
188—Menu Card, Hotel Fort Shelby, Detroit, Mich.	II	1075	Not printed	
189—Bid March 13, 1933, Naval Supply Depot, Norfolk, Va.	II	1088	Not printed	
190—Bid February 11, 1933, U. S. Marine Corps, Navy Building, Washington, D. C.	II	1089	Not printed	
191—Bid of Price Brothers, May 18, 1933, Naval Home, Philadelphia, Pa.	II	1091	Not printed	
192—Plaintiff's Individual Carton, Large Biscuit	II	1098	...	...
193—Blueprint Diagrammatic Sketch Defendant's Mill	II	1107	Not printed	

*Formal offer and admission of exhibit in evidence deleted in condensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
194—Photographs (13) Illustrating Defendant's Operation	II	1111	Not printed	
195—Sample of Shreds First Time Through Rolls	II	1116	...	...
196—Sample of Shreds Second Time Through Rolls	II	1116	...	...
197—Sample of Shreds Third Time Through Rolls	II	1116	...	...
198—Carton of Fifteen Biscuit at 400 Degrees 1½ Hours	II	1117	...	...
199—Sample of Biscuit With Brown Band	II	1122	...	...
200—Sample of Biscuit With Green Band	II	1122	...	...
201—Sample of Biscuit With K Stamped Thereon	II	1123	...	...
202—Sample of Biscuit With Red Food Coloring	II	1123	...	...
203—Sample of Biscuit With Brown Food Coloring	II	1124	...	...
204—Sample of Biscuit With Green Strip on Top	II	1124	...	...
205—Sample of Biscuit With Green Strip on Bottom	II	1124	...	...
206—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
207—Sample of Biscuit With Brown Stripes	II	1125	...	...
208—Sample of Biscuit With K Impressed Thereon	II	1125	...	...
209—Biscuit as Shown, Sketch A Attached to Exhibit 262	II	1130	...	...
210—Sample Diamond Shape Biscuit	II	1179	...	...
211—Sample Diamond Shape Biscuit	II	1179	...	...
212—Sample Biscuit With Band of Paper	II	1139	...	...
213—Sample Biscuit With Tag	II	1140	...	...
214—Sample Biscuit Enclosed in Envelope	II	1140	...	...
215—Large Card Carrying Samples of Plaintiff's and Defendant's Cartons	II	1151*	...	...

*Formal offer and admission of exhibit in evidence deleted in con-
sensing record.

DEFENDANT'S EXHIBITS—Continued.

Ex. No.	Admitted		Printed	
	Vol.	Page	Vol.	Page
216—Large Card Carrying Samples of Cartons of Defendant's Cereal Products	II	1151*	...	...
217—Defendant's Shipping Container Case No. 360	II	1152	...	...
218—Defendant's Shipping Container Case No. 324	II	1152	...	...
219—Window Display Card of Plaintiff	II	1152	...	...
220—Samples of Defendant's Cartons	II	1153	...	...
221—Photographs (2) of Store Displays	II	1153	Not printed	
222—Letter June 2, 1932, C. K. Brace, Manager, National Biscuit Co., Denver, Col., to All Jobbers	II	1154	IV	169
223—Chart of Kellogg's Shredded Wheat Bis- cuit Cartons	II	1155	Not printed	
224—Three Cartons Kellogg's Shredded Krum- bles	II	1155	...	...
225—Advertisement Chicago Daily Tribune, June 2, 1928	II	1155	Not printed	
226—Advertisement The Battle Creek Moon Journal, May 25, 1922	II	1156	Not printed	
227—Open Letter of Plaintiff to "Dear Madam"	II	1157	Not printed	
228—Carton Complimentary Samples Shredded Whole Wheat	II	1157	...	...
229—Pamphlet Fifty Ways of Serving Shredded Whole Wheat	II	1157	Not printed	
230—Recipes for New and Delicious Energy Dishes	II	1157	Not printed	
231—Carton Kellogg's Battle Creek Shredded Wheat	II	1158	...	...
232—Registration No. 276,592, Battle Creek, Shredded Wheat	II	1158	Not printed	
233—Chamber's Journal, January 27, 1900	II	1158	Not printed	

*Formal offer and admission of exhibit in evidence deleted in con-
densing record.

DEFENDANT'S EXHIBITS—Continued.

	Admitted Vol. Page	Printed Vol. Page
4—File Wrapper and Contents, Trade-mark Registration No. 178,725, Shredded Wheat	II 1159	IV 171
5—File Wrapper and Contents, Trade-Mark Registration No. 213,456 Shredded Wheat	II 1159	IV 181
6—Book of Trade-Mark Registrations of Plaintiff	II 1160	IV 193
7—Collection of Correspondence	II 1161	Not printed
8—Samples of Shredded Paper, Shredded Gel- atine and Shredded Cellophane	II 1161	... ..
9—Reproduction of Kellogg Biscuit Prior to 1920	II 1162	Not printed
10, 240-A, 240-B—Box of Split Peas, Lima Beans and Pop Corn, With Cellophane Windows	II 1163	... ..
11—Advertisements in Grocery World, Five Sheets	II 1165	Not printed
12—Perky U. S. Patent No. 548,086, October 15, 1895	II 1166	IV 207

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
242	—Book of Patents Issued to Plaintiff, Viz.:		
	Perky & Ford U. S. Patent No. 502,378, August 1, 1893	II 1166	V 1
	Perky U. S. Patent No. 520,496, May 29, 1894	II 1166	V 5
	Perky U. S. Patent No. 532,286, Janu- ary 8, 1895	II 1166	V 11
	Perky U. S. Patent No. 532,480, Janu- ary 15, 1895	II 1166	V 15
	Perky U. S. Patent No. 532,481, Janu- ary 15, 1895	II 1166	V 21
	Perky U. S. Patent No. 532,697, Janu- ary 15, 1895	II 1166	V 25
	Perky U. S. Patent No. 532,698, Janu- ary 15, 1895	II 1166	V 29
	Perky U. S. Patent No. 533,551, Febru- ary 5, 1895	II 1166	V 33
	Perky U. S. Patent No. 533,552, Febru- ary 5, 1895	II 1166	V 37
	Perky U. S. Patent No. 533,553, Febru- ary 5, 1895	II 1166	V 41
	Perky U. S. Patent No. 533,554, Febru- ary 5, 1895	II 1166	V 45
	Perky U. S. Patent No. 533,555, Febru- ary 5, 1895	II 1166	V 49
	Montgomery U. S. Patent No. 533,821, February 5, 1895	II 1166	V 55
	Perky U. S. Patent No. 548,086, Octo- ber 15, 1895	II 1166	V 59
	Perky U. S. Design Patent No. 24,688, September 17, 1895	II 1166	V 61
	Perky U. S. Patent No. 571,284, Novem- ber 10, 1896	II 1166	V 65
	Perky U. S. Patent No. 598,745, Febru- ary 8, 1898	II 1166	V 77

DEFENDANT'S EXHIBITS—Continued.

	Admitted Vol. Page	Printed Vol. Page
Perky U. S. Patent No. 614,338, November 15, 1898	II 1166	V 81
Perky U. S. Patent No. 618,288, January 24, 1899	II 1166	V 87
Perky U. S. Patent No. 667,892, February 12, 1901	II 1166	V 91
Perky U. S. Patent No. 678,127, July 9, 1901	II 1166	V 109
Perky U. S. Patent No. 678,625, July 16, 1901	II 1166	V 121
Perky U. S. Patent No. 681,656, August 27, 1901	II 1166	V 135
Burbank U. S. Patent No. 683,100, September 24, 1901	II 1166	V 143
Burbank U. S. Patent No. 683,101, September 24, 1901	II 1166	V 149
Burbank U. S. Patent No. 684,789, October 22, 1901	II 1166	V 155
Burbank U. S. Patent No. 685,671, October 29, 1901	II 1166	V 165
Perky U. S. Patent No. 713,795, November 18, 1902	II 1166	V 169
Perky U. S. Patent No. 746,145, December 8, 1903	II 1166	V 173
Burbank U. S. Patent No. 770,159, September 13, 1904	II 1166	V 181
Horner U. S. Patent No. 785,554, March 21, 1905	II 1166	V 189
Perky U. S. Patent No. 797,604, August 22, 1905	II 1166	V 201
Smith U. S. Patent No. 1,195,114, August 15, 1916	II 1166	V 225
Anderson U. S. Patent No. 1,334,429, March 23, 1920	II 1166	V 231
House U. S. Patent No. 1,592,768, July 13, 1926	II 1166	V 243

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted Vol. Page	Printed Vol. Page
	Webster U. S. Patent No. 1,592,797, July 13, 1926	II 1166	V 301
	Anderson U. S. Patent No. 1,621,863, March 22, 1927	II 1166	V 313
243—	Valentine U. S. Patent No. 831,909, Sep- tember 25, 1906	II 1166	V 319
244—	Book of Patents Issued to Defendant, Viz.: Valentine U. S. Patent No. 1,102,614, July 7, 1914	II 1166	V 331
	Kellogg U. S. Patent No. 1,159,045, November 2, 1915	II 1166	V 355
	Kellogg U. S. Patent No. 1,189,130, June 27, 1916	II 1166	V 357
	Kellogg U. S. Patent No. 1,197,297, September 5, 1916	II 1166	V 361
	Kellogg U. S. Patent No. 1,783,434, December 2, 1930	II 1166	V 361
	Hanford U. S. Patent No. 1,091,509, March 31, 1914	II 1166	V 373
	Valentine U. S. Patent No. 1,124,363, January 12, 1915	II 1166	V 411
	Valentine U. S. Patent No. 1,143,151, June 15, 1915	II 1166	V 417
245—	Book of Miscellaneous Patents Issued to Others Than Plaintiff or Defendant, Viz.: Cooley U. S. Patent No. 782,109, Feb- ruary 7, 1905	II 1167	V 437
	Williams U. S. Patent No. 820,899, May 15, 1906	II 1167	V 441
	Williams U. S. Patent No. 878,262, Feb- ruary 4, 1908	II 1167	V 445
	Williams U. S. Patent No. 896,964, Au- gust 25, 1908	II 1167	V 451
	Williams U. S. Patent No. 897,182, Au- gust 25, 1908	II 1167	V 455

DEFENDANT'S EXHIBITS—Continued.

Ex No.		Admitted		Printed	
		Vol.	Page	Vol.	Page
	Williams U. S. Patent No. 931,243, August 17, 1909	II	1167	V	459
	Williams U. S. Patent No. 949,013, February 15, 1910	II	1167	V	469
	Williams U. S. Patent No. 991,584, May 9, 1911	II	1167	V	489
	Williams U. S. Patent No. 1,024,168, April 23, 1912	II	1167	V	493
	Williams U. S. Patent No. 1,062,627, May 27, 1913	II	1167	V	505
	Black U. S. Patent No. 1,210,589, January 2, 1917	II	1167	V	511
	Williams U. S. Patent No. 1,263,009, April 16, 1918	II	1167	V	513
6	Bid of Plaintiff May 8, 1933, Department of Interior, Washington, D. C.	II	1170	Not printed	
7	Bid of Plaintiff December 12, 1932, U. S. Marine Corps, Washington, D. C.	II	1171	Not printed	
8	Bid of Plaintiff March 17, 1933, U. S. Marine Corps, Washington, D. C.	II	1172	Not printed	
9	Bid of Defendant February 3, 1933, Marine Barracks, Dover, N. J.	II	1172	Not printed	
10	Advertisement, The Natural Food Co. in New York Daily Tribune, May 12, 1907	II	1176	Not printed	
11	Advertisement, The Shredded Wheat Co. in Trade, Detroit, April 9, 1913	II	1176	Not printed	
12	Package of Arrowroot Biscuits	II	1177	Not printed	
13	Package of Fig Newtons Biscuits	II	1177	Not printed	
14	Package of Hydrox Biscuits	II	1177	Not printed	
15	Certificate of Incorporation of The Colorado Shredded Wheat Co.	II	1177	Not printed	
16	Carton of Kellogg's Corn Flakes	II	1178	...	
17	Clarke Sketch of Cutting of Diamond-Shape Biscuit	II	1178	Not printed	

DEFENDANT'S EXHIBITS—Continued.

Ex. No.		Admitted		Printed	
		Vol.	Page	Vol.	Page
258	Chart Illustrating Cartons of Plaintiff's Wheat Biscuit and Triscuit	II	1179	Not printed	
259	Box Plaintiff's Butter Thin Biscuit	III	2035	...	...
260	Box Plaintiff's Uneeda Biscuit	III	2035	...	...
261	Box Plaintiff's Graham Crackers	III	2035	...	...
262	Box Plaintiff's Premium Flake Crackers ..	III	2035	...	...

DEFENDANT'S EXHIBIT UNDER RULE 46.

A—Proceedings in the Patent Office III 2021 Not printed

Proceedings in the United States Circuit Court of Appeals are included
in Vol. 3-A

UNITED STATES OF AMERICA, }
DISTRICT OF DELAWARE, } ss.:

BE IT REMEMBERED, that at a District Court of the United States for the District of Delaware, begun and held at the United States Court House and Post Office Building, in the City of Wilmington, in said District of Delaware, at the time and place required by law, among other, the following proceedings were had, to wit:

NATIONAL BISCUIT COMPANY,
Plaintiff,

v.

KELLOGG COMPANY,
Defendant.

No. 980. IN EQUITY.

DOCKET ENTRIES.

- June 11, 1932. Bill of complaint filed; same day subpoena issued, returnable July 1, 1932.
- June 17, 1932. Marshal returns on subpoena, "Served", &c.; same day writ filed.
- June 29, 1932. Defendant appears by E. Ennalls Berl, Esqr., its solicitor; same day praecipe filed.
- June 30, 1932. Stipulation filed; same day order extending time for filing answer until August 1, 1932; same day order filed.
- Aug. 3, 1932. Stipulation filed; same day order extending time for filing answer until

Docket Entries

August 10, 1932; same day order
filed.

Aug. 8, 1932. Answer filed.

Aug. 30, 1932. Plaintiff's reply to defendant's
affirmative defense, filed.

Oct. 29, 1932. Stipulation filed; same day order ex-
tending time for taking deposi-
tions, &c.; same day order filed.

Dec. 14, 1932. Stipulation filed; same day order ex-
tending time for taking depositions,
&c.; same day order filed.

Dec. 15, 1932. Stipulation filed.

Dec. 27, 1932. Order granting leave to file plaintiff's
interrogatories; same day order
and interrogatories filed. (Exit
copy to defendant's attorneys.)

May 22, 1933. Defendant's answers to plaintiff's in-
terrogatories, filed.

May 22, 23, 24,
25, 26, 31,
1933. Trial.

June 1, 2, 1933. Trial.

June 2, 1933. Depositions on behalf of plaintiff and
defendant (in 10 volumes) filed.

June 2, 1933. Record of proceedings at trial, filed.

Aug. 1, 1933. Plaintiff's requests for findings of
fact and conclusions of law, filed.

Sept. 30, 1933. Defendant's requests for findings of
fact and conclusions of law, filed.

Oct. 31, 1933. Hearing on pleadings and proofs.

- Nov. 1, 1933. Hearing on pleadings and proofs.
- Jan. 11, 1935. Opinion of court filed.
- Jan. 12, 1935. Final decree dismissing bill of complaint, with costs against the plaintiff; same day decree filed.
- Feb. 12, 1935. Plaintiff's petition for appeal with assignments of error, filed; same day order allowing appeal, bond in the sum of \$500.; same day order filed.
- Feb. 20, 1935. Plaintiff's præcipe of lodgment of condensed statement of the evidence, with four volumes, filed.
- Feb. 20, 1935. Notice to defendant's solicitor of lodgment of condensed statement of testimony, filed.
- Feb. 20, 1935. Plaintiff's præcipe for transcript of record with acceptance of service by solicitor for defendant endorsed thereon, filed.
- Feb. 22, 1935. Order approving bond on appeal in the sum of \$500, with American Surety Company of New York, as surety; same day bond filed.
- Feb. 22, 1935. Citation issued.
- Mar. 2, 1935. Citation with acceptance of service by solicitor for appellee endorsed thereon, filed.
- Apr. 23, 1935. Præcipe of defendant-appellee for inclusion of additional matter in transcript on appeal, filed.

Docket Entries

- Apr. 23, 1935. Stipulation with condensed narrative statement of evidence, filed; same day order approving record, &c.; same day order filed.
- Apr. 23, 1935. Stipulation filed; same day order for withdrawal of physical exhibits, &c.; same day order filed.

BILL OF COMPLAINT.

(Filed June 11, 1932.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

NATIONAL BISCUIT COMPANY,
Plaintiff,
v.
KELLOGG COMPANY,
Defendant.

No. 980. IN EQUITY.

Plaintiff, National Biscuit Company, for its bill of complaint against defendant, Kellogg Company, alleges:

1. That plaintiff, National Biscuit Company, is a corporation organized and existing under and by virtue of the laws of the State of New Jersey, a citizen and inhabitant of said State and has one of its manufacturing plants and a place of business at the City of Niagara Falls in the State of New York, and that defendant, Kellogg Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, a citizen and inhabitant of said State and has a manufacturing plant at Battle Creek, County of Calhoun and State of Michigan.

2. That this action is between citizens of different states for unfair competition in trade in which the amount involved, exclusive of interest and costs, exceeds the sum or value of three thousand dollars (\$3000).

3. That Cereal Machine Company was duly incorporated under the laws of the State of Colorado on

June 8, 1893; that it was engaged in the manufacture and sale of a whole wheat biscuit, an edible product; that Henry D. Perky was the founder of the business of said Cereal Machine Company and was president of said Cereal Machine Company; that on or about the seventeenth day of May, 1900, the name of said Cereal Machine Company was, pursuant to the laws of the State of Colorado, duly changed to Shredded Wheat Company; that in the year 1900 The Natural Food Company, a corporation, was duly organized under the laws of the State of New York; that in the year 1900 said The Natural Food Company acquired, succeeded to and thereafter continued until in the year 1930 the said business theretofore conducted by said Colorado corporation under the successive names Cereal Machine Company and Shredded Wheat Company; that on or about the fifteenth day of May, 1908, the name of said The Natural Food Company, was, pursuant to the laws of the State of New York, duly changed to The Shredded Wheat Company; that in the year 1898 plaintiff, National Biscuit Company, a corporation, was duly organized under the laws of the State of New Jersey and since its incorporation plaintiff has been and now is engaged in the manufacture and sale of edible products; that in the year 1930 plaintiff, National Biscuit Company, acquired and succeeded to the whole of the going business, trade-marks and property of said The Shredded Wheat Company, a New York corporation; that since plaintiff acquired and succeeded to the said going business of said The Shredded Wheat Company it has continued and is now continuing to conduct the same; that the said business which plaintiff acquired in the year 1930 and which it has been and now is continuing has been carried on as the "Shredded Wheat Division" of plaintiff and that the said going business which plaintiff acquired, continued and is now contin-

ing was begun in the year 1893 and has been carried on continuously since that time.

4. That plaintiff's said predecessors and plaintiff have manufactured and sold to the public from the time of the beginning of plaintiff's predecessors' operations in 1893 to the present time a whole wheat biscuit; that the same has always been made from whole wheat of the highest grade and quality and has always been made with great skill and care so as to retain the body and substance of the wheat in said biscuit, and was and is made in buildings and structures especially designed for the purpose and built at great expense and by mechanism also especially designed and with particular regard to purity and cleanliness, and in such manner that said whole wheat biscuit passes directly from the factory to the customer without opportunity for contamination by odors or any foreign substance; and that during all of said period plaintiff and its said predecessors have spent large sums of money in scientific investigation for the purpose of continually maintaining, improving and perfecting the method of manufacture and the quality of said product.

5. That at all times since 1901 plaintiff's predecessor and plaintiff have had a plant at Niagara Falls, New York, where said biscuit has been and is being made; that said plant at Niagara Falls, New York, has been open to the public and the complete process of the manufacture of said biscuit has been disclosed to the public; that in order to assure a complete inspection, plaintiff's said predecessor and plaintiff have employed guides at said plant at Niagara Falls, New York, and said guides conduct all visitors throughout said plant and explain in detail the various processes of manufacture, and that said plant is visited and inspected by many thousand persons annually.

6. That from the beginning of the manufacture of whole wheat biscuit by plaintiff's said predecessors and continuously until the present time, plaintiff's said predecessors and plaintiff have manufactured said whole wheat biscuit for sale and consumption, without material alteration or change, in a distinctive and peculiar shape and appearance; that said biscuit has been produced and baked so as always to present an appearance at once recognized and readily distinguishable from any other forms of food product ever before manufactured either from wheat or any other article; that the whole wheat biscuit of plaintiff is composed and built up solely of filaments of wheat, and is fashioned in a distinctive form, it being substantially rectangular and having rounded top and bottom surfaces and sharply severed ends and having the filaments of which it is composed arranged substantially parallel and its entire surface being browned by baking and rendered crisp and palatable as to its component parts.

7. That continuously during the past thirty-nine years, plaintiff's said predecessors and plaintiff have formed and baked said whole wheat biscuit product in the form and condition above stated, and said biscuit became known during said period of years to the general public by reason of the particular and distinctive shape, appearance and structure of the individual biscuit as above described, and also by reason of the care, skill and uniform high quality in manufacture; that for many years past said whole wheat biscuit has come to have and now has a special and secondary significance and meaning to the public by reason of the facts above set forth, and thus to mean and signify only the said biscuit of the manufacture and sale of plaintiff; that even when displayed separate and apart from plaintiff's carton and advertising matter and standing alone without other means of identification, plaintiff's

said biscuit has come to have with the general public the meaning and significance of the product and output only of plaintiff.

8. That continuously during the past thirty-nine years said biscuit of plaintiff has been associated by the public with plaintiff's said predecessors and plaintiff as sole source of manufacture, by its particular form and appearance and by the particular words and terms "Shredded Whole Wheat Biscuit," or "Shredded Wheat Biscuit," or "Shredded Wheat," the said words and terms having been originally adopted and used by plaintiff's predecessors as fanciful and distinctive designations identifying the said particular product of their origin; that plaintiff's said predecessor, The Shredded Wheat Company, a New York corporation, registered in the United States Patent Office on the fifteenth day of January, 1924, the said trade-mark consisting of the words "Shredded Wheat"; that said trade-mark registration bears No. 178,725 and is for biscuit or crackers; that said The Shredded Wheat Company also caused to be registered in the United States Patent Office on the twenty-fifth day of May, 1926, the trade-mark consisting of the words "Shredded Wheat"; that said trade-mark registration bears No. 213,456 and is for biscuits, crackers and cereal foods cooked or prepared for consumption; that no other person, firm, corporation or association has the right to use said trade-mark, consisting of the words "Shredded Wheat," in the United States for said products; that in the year 1909 plaintiff's said predecessor, The Shredded Wheat Company, a New York corporation, adopted and continued to use in its advertisements and upon packages containing said biscuit, the trade-mark consisting of a view of said whole wheat biscuit, a saucer or dish and a spoon placed within the saucer or dish, the biscuit being partly im-

mersed in cream; that said trade-mark was duly registered in the United States Patent Office on the thirtieth day of January, 1912, and bears registration No. 85,186; that said trade-mark registration No. 85,186 was duly renewed on or about October 20, 1931, for a further period of twenty (20) years from the thirtieth day of January, 1932; that in the year 1909 plaintiff's said predecessor, The Shredded Wheat Company, also adopted and used upon packages containing said biscuit the trade-mark consisting of a cut or representation of two said shredded wheat biscuit, and a saucer or dish, the said biscuit being placed therein and partly immersed in cream or milk; that said trade-mark was duly registered in the United States Patent Office on the seventeenth day of August, 1926, and bears registration No. 216,593 for biscuits, crackers and cereal foods cooked or prepared for consumption; that no other person, firm, corporation or association other than plaintiff has the right to use said trade-marks in the United States; that said trade-marks have been used upon packages containing said biscuit and in advertisements of said biscuit for many years and they were not abandoned by plaintiff's said predecessors or plaintiff; that plaintiff adopted and continued and is now using upon packages in which its said biscuit is packed a cut or figure of said biscuit; that said words, terms and trade-marks have been so associated with plaintiff's product that they have been and are indicative of source or origin continuously during said entire period from their adoption to the present time; that said words, terms and trade-marks so associated have grown to be the trade-marks and trade names of plaintiff for its said product and are the symbol of its good will and its commercial signature; that the said words, terms and trade-marks have for many years been indicative of the intrinsic worth and high quality of plaintiff's said biscuit product as a pure and

wholesome food for human consumption; that said words, terms and trade-marks taken singly or together have only the meaning in the public mind throughout the United States and in foreign countries and are applied to only one specific thing by the general public, to wit, the said well known and specific article of food manufactured and marketed for so many years by plaintiff's said predecessors and plaintiff; that said words, terms and trade-marks taken singly or together do not apply to, nor are they used in respect of, any other article or thing whatsoever, either in respect of a food for human consumption or otherwise, except for defendant's unlawful acts as hereinafter referred to; the said words, terms and trade-marks taken together have no meaning whatsoever in the public mind except in their association with the said biscuit of plaintiff and plaintiff as the sole source of manufacture; and that in consequence said words, terms and trade-marks, in association with the said whole wheat biscuit of plaintiff in their distinctive and well known form and appearance, have long since acquired a secondary meaning and special significance in respect of source or origin for the said product of plaintiff.

9. That the volume of sales of plaintiff's said biscuit during the early years immediately following its introduction into the market, was relatively small; that sales of said biscuit have increased and grown until 1,089,396,432 of said biscuit were sold in the calendar year 1928; that in the calendar years succeeding the year 1928 the manufacture and sale of said biscuit has closely approximated the said figure for the calendar year 1928; and that said product now goes into the homes as a food product of more than twenty-five million families annually.

10. That the growth of the business of plaintiff and its said predecessors in the marketing of said bis-

cuit product, has been largely a matter of education and a gradual appreciation by the public of said food product of plaintiff; that said product was an entirely new product, the merits of which were not initially understood or appreciated by the public; that the great value of said product was explained and made known to the public through continuous years of expensive advertising and house to house canvassing, in order to demonstrate and convince it that plaintiff's said biscuit product was of great dietetic and food value, free from all adulterations, nutritious in body and substance and without opportunity of adulterations and contaminations in its manufacture.

11. That for very many years past plaintiff's said predecessors and plaintiff have continuously associated with said biscuit product the said words and terms "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat," a cut, representation or picture of plaintiff's said distinctive form of biscuit and a cut, representation or picture of said biscuit placed in a saucer and partly immersed in cream, in order more closely to associate said words and terms in the minds of members of the public with the actual biscuit when out of the carton and with plaintiff as the source or origin; that for more than thirty-nine years past plaintiff and its said predecessors have advertised and made known their said biscuit product together with said words and terms through a wide variety of mediums known to the advertising trade, such as letter heads, billboards, newspapers, magazines, booklets, pamphlets, circulars, menu cards, public exhibits, free samples, lectures, house to house canvassing, etc.; that during the many years of the manufacture and marketing of said biscuit, plaintiff's said predecessors and plaintiff have expended many millions of dollars in said advertising and education of the public, and the

economies of large production effected by reason of the increased volume of sales due to such advertising and educational work have benefited the purchasing public.

12. That a large percentage of the stores and restaurants which purchase plaintiff's said biscuit product and vend the same to their customers separate the same from the cartons or containers in which they are packed by plaintiff and display the same in windows, glass globes and other transparent containers, and in bowls, dishes and saucers without any mark of identification thereon or associated therewith, and that when so separated, displayed and exhibited, the public by reason of said continuous and extensive advertising and education by plaintiff, always and immediately recognize said biscuit product as "Shredded Whole-Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat," the product of plaintiff alone; that vast numbers of plaintiff's said biscuit are individually served in restaurants, hotels, boarding houses, homes, etc., to the ultimate consumer without any mark of identification thereon or associated therewith; that said biscuit associated with said words and terms mean to such ultimate consumer only the biscuit of plaintiff, by reason of their well known distinctive form, shape, color, structure, substance, quality and general appearance and character; and that at all times when the ultimate consumers order "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" or "Shredded Wheat," they intend and for many years have intended the well known biscuit product of plaintiff and no other article.

13. That through the many years of use of the said biscuit of plaintiff, obtained by consumers upon their request by the words and symbols above stated, the public has developed a confidence in the composition, quality, purity and food value of plaintiff's prod-

net the sale of which has increased in large proportions until in the year 1928, 1,089,396,432 of said biscuit were made and sold; that the long association of said words, terms and symbol with said biscuit of plaintiff and plaintiff as the source of production, has developed in the public mind a continual guaranty of quality and food value in respect of plaintiff's product; that the terms "Shredded Whole Wheat Biscuit," "Shredded Wheat Biscuit" and "Shredded Wheat" and said symbols mean to the public the said familiar product of plaintiff alone, and not a product of similar appearance of the manufacture and sale of any other person, firm, corporation or association; that the public has developed the habit and custom of purchasing and consuming the biscuit of plaintiff because of its source or origin; that the supply to a purchaser of any product having a similar appearance but coming from a different source, upon his order or any of said words and terms above stated, constitutes deception upon him; that such other product being unknown to a purchaser, it would not be the article of food that he had intended to receive and would be as different from his conception as though of entirely different appearance and identified by different characterizations; that as said biscuit is manufactured food for human consumption, its origin is of infinitely more interest and consequence to the public than would be the origin of some article for manual use, the fitness of which may be judged by inspection; and that the chemical and dietetic effect of a food is not determined by its appearance but its content, and the public relies upon the skill and honesty of the maker and desires such product because of confidence in knowledge of its source, and for that reason accepts the appearance of the shredded wheat biscuit and the said distinguishing words, names and marks as guaranteed of its source purity and wholesomeness.

14. That during said period of thirty-nine years prior to the conduct of the defendant herein presented, no person, firm, corporation or association has engaged in the manufacture and sale of a whole wheat biscuit made in the shape, form, color, structure and appearance of plaintiff's product, except that in 1915 Ross Food Company, a New York corporation, did for a short time engage in the manufacture of a biscuit, called "Ross' Whole Wheat Biscuit"; that the same was made in imitation of plaintiff's product and was of somewhat similar appearance; that plaintiff at said time instituted a suit in equity in the District Court of the United States for the District of Connecticut against The Humphrey-Cornell Company, a wholesale grocery company distributing the biscuit of said Ross Food Company, together with said Ross Food Company and certain of the individuals who had organized said Ross Food Company; that in said suit an injunction was issued by said District Court restraining the defendants therein from manufacturing and selling said product unless each biscuit was specially marked so as to indicate distinctively and effectively that the same was made by defendants therein and not by plaintiff, and the decree of said District Court as to injunction, with certain modifications, was affirmed by the United States Circuit Court of Appeals for the Second Circuit. The decision of the said District Court in said suit is reported in 244 Fed. Rep. 509 and the decision of the United States Circuit Court of Appeals for the Second Circuit on appeal in said suit is reported in 250 Fed. Rep. 960.

15. That long subsequent to the marketing of plaintiff's said whole wheat biscuit and the adoption and use by plaintiff of the said words, terms and symbols or marks defendant herein began the manufacture of a whole wheat product which it designated and

named in display type upon its cartons and containers "Shredded Whole Wheat Biscuit" and said product so designated has been offered for sale and sold by defendant and advertised to the purchasing public by defendant and retailers engaged in the sale of defendant's product to the purchasing public; that subsequently the defendant began and now is engaged in making and selling whole wheat biscuit simulating the whole wheat biscuit of plaintiff in particular and distinctive shape, appearance and structure and has packaged the same in packages or cartons upon which is displayed the representation of said biscuit placed in a saucer in imitation and simulation of the trade mark of plaintiff consisting of the representation of the genuine biscuit of plaintiff placed in a dish or saucer that; defendant has used in its advertisements of its said biscuit made in imitation of plaintiff's genuine biscuit, made in particular and distinctive shape, appearance and structure a cut, picture or representation of a biscuit in association with the word "Shredded"; and that defendant and retailers of defendant's said imitation whole wheat biscuit have advertised in newspapers defendant's said biscuits as "Shredded Wheat" and have embodied in some of such advertisements the well-known trade name "Shredded Wheat" of plaintiff for plaintiff's said whole wheat biscuits, a representation of biscuits placed in a saucer, to wit, in many newspapers among those published as follows:

The Circleville Herald, Circleville, Ohio, March 27, 1931;

Lancaster, Ohio, Daily Gazette, Lancaster, Ohio, April 3, 1931;

Tulsa Retailers' Tribune, Tulsa, Oklahoma, August, 1931;

Brown County Journal, New Ulm, Minnesota, August 28, 1931;

Johnstown Tribune, Johnstown, Pennsylvania,
August 21, 1931;
The Bethlehem Globe-Times, Bethlehem, Pennsylvania,
April 7, 1931;
Marion Star, Marion, Ohio, April 4, 1931;
The Janesville Daily Gazette, Janesville, Wisconsin,
May 19, 1931;
St. Paul Dispatch, St. Paul, Minnesota, April 9,
1931;
New Bedford Times, New Bedford, Massachusetts,
May 19, 1931;
Bangor Daily News, Bangor, Maine, April 11,
1931;
Fall River Herald News, Fall River, Massachusetts,
April 3, 1931;
Times, New Haven, Connecticut, August 28, 1931;
New Ulm Journal, New Ulm, Minnesota, August
28, 1931;
The Pittsburgh Press, Pittsburgh, Pennsylvania,
April 1, 1932;
Lancaster Daily Intelligencer Journal, Lancaster,
Pennsylvania, March 19, 1932;
Courier Post, Camden, New Jersey, February,
1932;
The Evening Bulletin, Providence, Rhode Island,
April 1, 1932;
The Evening Bulletin, Providence, Rhode Island,
March 22, 1932;
Bridgeport Post & Telegram, Bridgeport, Connecticut,
March 21, 1932;
Hartford Times, Hartford, Connecticut, March,
1932;
Norfolk Ledger Dispatch, Norfolk, Virginia,
March 29, 1932;
The Houston Chronicle, Houston, Texas, March
25, 1932;
The Retailer, Miami, Florida, March , 1932;

- St. Paul Dispatch, St. Paul, Minnesota, March 22, 1932;
The Daily Northwestern, Oshkosh, Wisconsin, March 25, 1932;
Eau Claire Telegram, Eau Claire, Wisconsin, April 5, 1932;
The Des Moines Tribune, Des Moines, Iowa, April 1, 1932;
St. Louis Daily Globe-Democrat, St. Louis, Missouri, March 30, 1932;
Tulsa Retailers' Tribune, Tulsa, Oklahoma, March, 1932;
The Los Angeles Evening Herald, Los Angeles, California, March 25, 1932;
Los Angeles Times Merchandiser, Los Angeles, California, April, 1932;
Miami Herald, Miami, Florida, April 27, 1932;
Manila Daily Bulletin, Manila, P. I., March 11, 1932;
Daily Times, Erie, Pennsylvania, April 1, 1932;
The Greensboro Record, Greensboro, North Carolina, March 25, 1932;
Danville Commercial News, Danville, Illinois, April 22, 1932;
Minneapolis Journal, Minneapolis, Minnesota, April 15, 1932;
Evening World-Herald, Omaha, Nebraska, April 8, 1932;
Bulletin of Merchandising and Sales Promotion, Bridgeport, Connecticut, March 21, 1932;
Wausau Herald, Wausau, Wisconsin, April 1, 1932;

that the manufacture and marketing of said products by defendant in imitation of the genuine biscuit of plaintiff of distinctive and peculiar shape and appearance and the use of the word "Shredded" in connec-

tion with the said products, the use of a cut or picture of said biscuit alone or in association with the word "Shredded" and the representation of said biscuits placed in a dish or saucer occurred without the consent of plaintiff and in derogation and violation of its rights.

16. That said product of the defendant is not the biscuit manufactured and produced by plaintiff for so many years and which the public has always associated with the words and terms "Shredded Whole Wheat Biscuit" or "Shredded Wheat Biscuit" or "Shredded Wheat" or by said symbols or marks, but said biscuit manufactured by the defendant is an imitation in appearance of the product manufactured by plaintiff in that it closely simulates the same in height, measurements in circumference, color, structure and formation, differing in appearance only in that it is somewhat shorter on the fragile ends and is devised to appear like the genuine but contains less wheat; and that the purpose and effect of defendant in manufacturing and marketing said article designated as "Shredded" whole wheat biscuit, is so to take advantage of and to appropriate to itself the good-will and trade names of plaintiff established through years of effort and at tremendous financial expenditure for advertising and in educating the public, as well as the recognized reputation of plaintiff as the source or origin of a unique product of the highest quality and so made as to insure the highest degree of purity and wholesomeness.

17. That prior to undertaking the manufacture of said biscuit in imitation of plaintiff's product, defendant manufactured and sold a whole wheat biscuit of a different type, style and appearance under the name of "Kellogg's Toasted Whole Wheat Biscuit"; that plaintiff is informed and believes and therefore alleges that the manufacture and sale of said toasted whole wheat

biscuit was not financially successful and was discontinued; that thereafter defendant manufactured and marketed a biscuit more in semblance of plaintiff's product than defendant's said "Toasted Whole Wheat Biscuit," although not as close an imitation as the product now complained of, under the name of "Shredded Whole Wheat Biscuit"; that plaintiff protested against the marketing of said biscuit and the use of said words and terms "Shredded Whole Wheat Biscuit" appropriated for it, immediately upon learning of the same and the marketing of said product was discontinued by defendant; that more recently, defendant continuing to seek to take advantage of the success of plaintiff's said product, has engaged in the manufacture and marketing of the product complained of in imitation of that of plaintiff, and has employed with it words, terms and trade marks which have always been associated only with plaintiff's products, and is attempting to occupy the same market and sell its product to the same purchasers and consumers as have in the past purchased the said biscuit of plaintiff.

18. That said conduct of defendant conveys to the public a false impression as to the origin of the biscuit produced by it; that the public is deceived by the similarity in appearance of the biscuit of defendant made in imitation of the said biscuit of plaintiff, the designation "Shredded" Whole Wheat Biscuit, "Shredded" wheat, the cut or picture of said biscuit in association with the word "Shredded" and the cut of said biscuit placed in a saucer; that the public desiring the said well-known product of plaintiff by reason of its confidence therein, upon ordering the same by the words and terms long associated with it, will, without the test or trial to which a new food of another manufacture is customarily subjected, unwittingly accept the unknown imitation in place of the genuine; that the defendant

thereby benefits and will continue to benefit unlawfully by reason of its improper appropriation of the words, marks, terms and appearance associated with plaintiff's biscuit and in proportion to the success of that unlawful appropriation enjoy unjustly benefits of the good-will of plaintiff; and that in the event that defendant is permitted to violate the public confidence through the substitution of its said imitation biscuit and to appropriate for its product the distinctive form and appearance of plaintiff's said biscuit and also the terms and trade marks herein complained of, other manufacturers by like practices may do the same and while maintaining the imitative appearance of plaintiff's said biscuit, progressively lower the standard of quality and purity and thereby destroy the public confidence in the product of plaintiff and the good-will of plaintiff built up at great expense over a period of thirty-nine years of faithful effort to maintain the high quality and food value of said product which the public has always associated with plaintiff's said predecessors and plaintiff as sole source of origin.

19. That vast quantities of the biscuit manufactured by plaintiff reach consumers in restaurants, hotels, boarding houses, and homes outside of and independently of packages, and without any identifying mark other than the form, shape, color and appearance of the biscuit, all of which features the public has long since come to associate solely with the biscuits manufactured by plaintiff's predecessors and plaintiff; that the biscuits of defendant reach consumers in restaurants, hotels, boarding houses and homes outside of and independently of the packages; that the manufacture and sale by defendant of its biscuit made in imitation of the well-known biscuit of plaintiff, without means thereon of identification of the source or origin facilitates the palming and passing off of defendant's said

biscuit as and for the said well-known biscuit of the manufacture and sale of plaintiff by proprietors of restaurants, hotels, boarding houses and other establishments when individual biscuits are served independently of the carton all with the danger that the public confidence in plaintiff will be undermined and its demand for plaintiff's said biscuit will diminish, all with great loss and injury to plaintiff.

20. That in many instances and recently actual deception and deceit has been practiced upon the public; that upon request of dealers and ultimate consumers who have sought to obtain said "Shredded Whole Wheat Biscuit," or "Shredded Wheat Biscuit," or "Shredded Wheat," of plaintiff the product of defendant has been palmed off and sold in the place and stead of the genuine biscuit known to the public and of which plaintiff and its said predecessors have always been the sole source of supply, all in unfair and unlawful competition with plaintiff and to its great loss and damage.

21. That in order further to facilitate the process of appropriating the good-will of plaintiff and in palming off the product of the defendant upon order for the biscuit of plaintiff, defendant has imitated on its cartons and packages the substance of the advice and directions to consumers that have always appeared upon the cartons and containers of plaintiff and that defendant's said biscuits are sold in the market at a less price than that of plaintiff.

22. That defendant for a number of years past has marketed certain breakfast foods other than the biscuit above complained of, and has competed with plaintiff in its sale to the same general class of consumers; that plaintiff is apprehensive that defendant, if not restrained by this Court, will proceed to flood

the market with a progressively poorer quality of imitation biscuit and maintain in respect of such imitation the appearance of plaintiff's biscuit and appropriate therefor said words, terms and trade-marks now associated in the mind of the public with plaintiff's product alone, and thereby, through a progressive campaign of substitution and deceit of the public, occasion increased confusion and a growing distrust of the product of plaintiff, and through accumulation thereof effect ruin of plaintiff's good-will and high standing and increase the public demand for the other different breakfast foods now being marketed by defendant.

23. That the full value of plaintiff's said equitable rights in the said words and terms "Shredded Whole Wheat Biscuit", "Shredded Wheat Biscuit" and "Shredded Wheat", the particular and distinctive shape, appearance and structure of said biscuit, the said trade-marks "Shredded Wheat", the representation of said biscuit and the cut or picture of said biscuit placed in a dish or saucer in connection with plaintiff's said Shredded Whole Wheat Biscuit exceeds the sum or value of \$5,000,000 and that the said acts of the defendant, unless restrained, will destroy the value of plaintiff's rights in and to said property.

24. That the acts of the defendant herein complained of were knowingly and intentionally committed, are contrary to equity and good conscience, a fraud upon the public and constitute unfair competition in trade with plaintiff and a fraudulent invasion of and violation of plaintiff's rights; and that said acts of defendant are calculated to deceive purchasers, and necessarily enable and promote false, fraudulent and unfair competition in business and false, fraudulent and unfair appropriation and use of the words, terms

and symbols so appropriated by defendant as aforesaid, and the fraudulent and unlawful sale and substitution by unscrupulous persons of the product of defendant for the genuine biscuit of plaintiff.

25. That, upon information and belief, the said unlawful, wrongful and fraudulent acts of defendant have caused damage to plaintiff in at least the sum of \$250,000 but as to the exact amount plaintiff cannot set forth and prays discovery.

26. Plaintiff alleges that it can have no adequate relief against the defendant for its said acts of unfair competition in trade with plaintiff except in this a court of equity.

Wherefore plaintiff prays:

1. That the defendant be required to appear and answer unto this bill of complaint but not under oath, answer under oath being hereby waived.

2. That this Court enter a decree holding that plaintiff's said predecessors were the first to use and that plaintiff is vested with the exclusive right in and to the whole wheat biscuit made in said particular and distinctive shape, appearance and structure, in and to the name "Shredded" and "Shredded Wheat" in connection with said whole wheat biscuit, in and to the representation or picture of said whole wheat biscuit made in said particular and distinctive shape, appearance and structure, and in and to the representation of said biscuit of particular and distinctive shape, appearance or structure placed in a saucer or dish.

3. That an injunction, both provisional during the pendency of this suit and perpetual, be issued out of

and under the seal of this Court, directed to defendant, its officers, agents, attorneys, workmen, employees, its successors or assigns, and all others acting by or under its direction or authority, restraining and enjoining it and them, and each of them, from, directly or indirectly, manufacturing or selling whole wheat biscuit made in imitation and simulation of the said whole wheat biscuit of the manufacture and sale of plaintiff, of particular and distinctive shape, appearance and structure: from employing upon cartons, in advertisements or otherwise the name "Shredded" in connection with said biscuit; from employing in advertisements or upon cartons containing said biscuit a cut or picture of said biscuit of particular and distinctive shape, appearance and structure, either alone or in association with the word "Shredded"; from using or employing on packages or in advertisements or otherwise the trade-mark consisting of the words "Shredded Wheat", or any simulation thereof; from using or employing on packages or in advertisements or otherwise the trade-mark consisting of the representation of said biscuit of particular and distinctive shape, appearance or structure placed in a saucer or dish, or any simulation thereof and from aiding, assisting or inducing others to advertise, sell, pass or palm off the whole wheat biscuit of the manufacture and sale of defendant as and for the whole wheat biscuit of the manufacture and sale of plaintiff.

4. That an accounting be awarded to plaintiff against defendant of defendant's profits, gains and advantages and the damages suffered by plaintiff by reason of defendant's said acts of unfair competition in trade with plaintiff.

5. For costs of this suit.

Bill of Complaint

6. For such other and further relief as the circumstances of the case may require.

NATIONAL BISCUIT COMPANY,

By (Sgd.) C. F. BLISS,
Vice President.

(Sgd.) ALEXANDER L. NICHOLS,

(Sgd.) HUGH M. MORRIS,

Solicitors for Plaintiff.

Dupont Building,

Wilmington, Delaware.

(Sgd.) DEURY W. COOPER,

Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

C. F. BLISS, being duly sworn, deposes and says that he is vice-president of National Biscuit Company, the plaintiff named in the foregoing bill of complaint; that he has read the foregoing bill of complaint and that the facts therein stated are true to his own knowledge except as to such facts as may be stated on information and belief, and as to such facts he believes it to be true; and the reason why this verification is not made by plaintiff personally is that plaintiff is a corporation of which affiant is a duly qualified officer.

(Sgd.) C. F. BLISS.

Subscribed and sworn to before me this third day of June, 1932.

(Sgd.) GEO. H. COPPERS,

(Seal)

Notary Public.

Notary Public, New York County.

County Clerk's No. 177, Reg. No. 3C178.

Term expires March 30, 1933.

ANSWER.

(Filed August 8, 1932.)

Defendant, Kellogg Company, for its answer to the bill of complaint herein, alleges:

That defendant is not advised save by the bill of complaint as to the matters alleged in paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, and 26 of the bill of complaint and therefore denies the same, and each of the same, leaving plaintiff strictly to its proofs, and defendant specifically denies that it has been guilty of any unlawful, wrongful or fraudulent acts as charged in the complaint, and defendant generally denies the allegations of the complaint, and each of them, except as to such facts as are hereinafter specifically alleged and admitted.

AFFIRMATIVE DEFENSE.

For an affirmative defense to the alleged cause of action set forth in the bill of complaint, defendant alleges:

1. That defendant, Kellogg Company, is a corporation organized and existing under and by virtue of the laws of the State of Delaware, a citizen and an inhabitant of said State and has a manufacturing plant at Battle Creek, County of Calhoun and State of Michigan, and that plaintiff, National Biscuit Company, is a corporation organized and existing under the laws of the State of New Jersey, with a regularly established manufacturing plant and place of business at New York City in the Southern District of the State of New York and another factory at Niagara Falls in the State of New York.

2. That, on information and belief, Cereal Machine Company was duly incorporated under the laws

of the State of Colorado on June 8, 1893; that it was engaged in the manufacture and sale of a shredded whole wheat biscuit, an edible product; that Henry D. Perky was the founder of the business of said Cereal Machine Company and was president of said Cereal Machine Company; that on or about the seventeenth day of May, 1900, the name of said Cereal Machine Company was, pursuant to the laws of the State of Colorado, duly changed to Shredded Wheat Company; that in the year 1900 The Natural Food Company, a corporation, was duly organized under the laws of the State of New York; that in the year 1900 said The Natural Food Company acquired, succeeded to and thereafter continued until in the year 1930 the said business theretofore conducted by said Colorado corporation under the successive names Cereal Machine Company and Shredded Wheat Company; that on or about the fifteenth day of May, 1908, the name of said The Natural Food Company was, pursuant to the laws of the State of New York, duly changed to The Shredded Wheat Company; that in the year 1898, plaintiff National Biscuit Company, a corporation, was duly organized under the laws of the State of New Jersey and since its incorporation said plaintiff has been and now is engaged in the manufacture and sale throughout the several States of edible products; that in the year 1930 plaintiff, said National Biscuit Company, acquired and succeeded to the whole of the going business, alleged trade-marks and property of said The Shredded Wheat Company, a New York corporation; that since said plaintiff acquired and succeeded to the said going business of said The Shredded Wheat Company, it has continued and is now continuing to conduct the same throughout the several States and with foreign nations; that the said business which plaintiff acquired in the year 1930 and which it has

been, and now is continuing has been carried on as the "Shredded Wheat Division" of plaintiff through direct sales offices and places of business of defendant located in various of the several states.

3. That plaintiff's said predecessors and plaintiff have been and are engaged in the manufacture of the familiar article of food known as shredded whole wheat biscuit or shredded wheat, the product having been formerly made under a series of patents of which the original and basic is for a product and a process. This patent was granted to said Henry D. Perky, the original promoter of the enterprise, in October, 1895, No. 548,086, and disclosed a process of boiling the original whole wheat berry, partially drying it, and then forcing it between compression rollers, one or both of which had peripheral grooves, which mashed the several parts of the berry into a heterogeneous soft paste. This paste was then forced out through combs or scrapers, so as to emerge in thin filaments or shreds. The patent states that the wheat in this form is ready for food, though it may be baked in various ways.

4. That in the actual manufacture of the shredded whole wheat biscuit, the pulpous shreds or filaments which proceed from the combs, as described in the said Perky product patent, are carried off upon a web or endless belt, and are built up by a succession of layers until a strand of the desired thickness is secured. This strand is cut at given intervals by knives or otherwise, thus making the longer edges of the biscuit, which through the pressure of the knives are matted or pressed together. The biscuits are then cooked in an oven which raises the top, except at the longer edges, which have been matted together, separating the shreds, and making more obvious the interstitial tex-

ture of the whole. The baking also browns the top and hardens the biscuit by drying; the color depends upon the manipulation of the heat and somewhat varies with the operator.

5. That in September of the same year, said Perry took out a design patent No. 24,688, dated September 17, 1895, for a term of fourteen years upon a biscuit, shown in the accompanying drawings and rectangular in plan view; the longer axis being about twice the shorter. The end view or section on the shorter axis was ovoid; the bottom or base of the biscuit being flatter than the top. The design also displayed the rough or filamented texture of the biscuit. It described as the leading feature of the design "a fibrous interstitial appearance, showing superimposed layers or irregular interlacing threads or filaments," in such wise that the threads are visible from the surface through the outer layers. This design resulted necessarily from the actual process of manufacture above described.

6. That the plaintiff's predecessor, the Cereal Machine Company, of Colorado, began the manufacture of this product in 1895, and the sale thereof by plaintiff and its said predecessors has been since continued.

7. That up until the year 1915 and later, plaintiff's predecessors carried, printed prominently upon the packages of their said shredded wheat, the following notice:

"September 17, 1895, Patented October 15, 1895.

This food, the process of making it, and special machinery for its manufacture, are under the protection of the United States Government by virtue of many patents, as follows:

52274, August 1, 1893	28785, June 7, 1898
52496, May 29, 1894	614338, November 15, 1898
52503, June 26, 1894	618288, January 24, 1899
52206, January 9, 1895	625696, May 23, 1899
52408, January 15, 1895	681656, August 27, 1901
52481, January 15, 1895	35511, December 21, 1901
52487, January 15, 1895	884788, October 22, 1901
52498, January 15, 1895	685671, October 29, 1901
52551, February 5, 1895	683100, September 24, 1901
52552, February 5, 1895	684789, October 22, 1901
52551, February 5, 1895	683101, September 24, 1901
52554, February 5, 1895	678127, July 9, 1901
52555, February 5, 1895	667892, February 12, 1901
52521, February 5, 1895	678625, July 16, 1901
52688, September 17, 1895	681656, August 27, 1901
54086, October 15, 1895	713793, November 18, 1902
54087, October 15, 1895	746145, December 8, 1903
55208, March 21, 1896	770159, September 14, 1904
571284, November 10, 1896	797604, August 22, 1905
571285, November 10, 1896	785554, March 21, 1905
58745, February 8, 1896	

8. That the basic patents relating to shredded wheat, namely, the Perky patents No. 548,086 and 548,087 granted on October 15, 1895, expired by limitation on October 15, 1912, and that all subsequent patents claimed by plaintiff's predecessor and listed on its food packages, as above set forth, have long since expired by limitation and the subject matter thereof has fallen into the public domain.

9. That in some of said patents, as well as some of the trade-mark registrations of plaintiff's predecessors and in the advertisements of plaintiff's predecessors during the life of said patents, the words "shredded wheat" and "shredded whole wheat biscuit" were used by the patentee, Perky, and by plaintiff's predecessors, and by the Patent Office as designative of the distinctive type of shredded biscuit or wheat product disclosed in the various shredded wheat patents, and that the Court of Appeals of the District of Columbia in a suit or judicial proceeding to which plaintiff's predecessor,

was a party held and determined that the words "shredded wheat" and "shredded whole wheat biscuit" were merely descriptive of the shredded wheat product as produced by said Perky and his machines for shredding wheat, and that said words are in fact and in law merely and purely descriptive of the product.

10. That the said patents of plaintiff's predecessors as hereinbefore listed gave to plaintiff's said predecessors a substantial monopoly in the products and processes covered thereby and that the words "shredded wheat" and/or "shredded whole wheat biscuit" came actually to indicate the class and type of product made by plaintiff's said predecessors and to constitute the true and generic description of said product then and still known as "shredded wheat" and/or "shredded whole wheat biscuit," and were used in that sense by plaintiff's predecessors and others.

11. That all of said patents on shredded wheat have long since expired as aforesaid, and that upon their expiration the right to use said processes and machinery and to make said formerly patented article as shown in the design patent aforesaid and to use said generic and strictly descriptive words "shredded wheat" and/or "shredded whole wheat biscuit" and to illustrate and describe the product itself, passed to the public with the dedication resulting from the expiration of said patents, whereupon the public acquired thereafter, and for all time, the right to make the product "shredded wheat" and/or "shredded whole wheat biscuit" and to use said generic and strictly descriptive term in all its forms and with the fullest liberty by affixing such name to the containers of the product, by referring to it in advertisements, by picturing it and the shredded wheat product itself in illustrations or

putting the product itself on display subject only to the condition, bearing equally upon all competitors, that the generic or descriptive name must not be so used as to deceive the public, or to deprive others of their lawful rights; subject also to the right of all new manufacturers to advise the public that the product formerly made only by the patentees, is subsequently being made lawfully by other manufacturers; subject also to the right of a new manufacturer of the old patent-expired product to be protected from oppression, confusion, deception or monopoly practices deliberately fostered or directed against it by the former owners of the expired patent monopoly; and subject finally to the condition that the new maker of the patent-expired product shall not be burdened with any competitive restrictions, to which the former patent-expired maker is unwilling or unable to submit, and which will be equivalent to the destruction of the right of free competition of the newcomer in the field.

12. That for many years since the expiration of the shredded wheat patents defendant has endeavored fairly and in good faith to exercise its lawful right to enter into the manufacture of shredded wheat and the sale thereof throughout the several states but that throughout said efforts it has been impeded, injured, oppressed and held back by the avowed claims of plaintiff and its predecessors in and to a complete and perpetual monopoly, in commerce among the several states, in and to the name "shredded wheat," the form, size and style of the biscuit itself, the claimed exclusive right to use the word "shredded" as a trade-mark and even in the explanatory matter on the carton and, finally, the claimed exclusive right to illustrate or represent the biscuit, and defendant alleges that these efforts of plaintiff and its predecessors constitute a direct violation of sections 1 and 2, and particularly

section 2, of the Sherman Anti-Trust Act, U. S. Code, Title 1, Chap. 1, Sections 1 and 2, Act of July 2, 1890, c. 647, 26 Stat. 209.

13. That defendant's efforts to enter into free and fair competition in the manufacture and sale of shredded wheat have been continuously exerted since a period long prior to January, 1923; that defendant has prepared for the manufacture and has manufactured and sold to the public, except so far as its business has been interfered with and impeded by the unlawful acts of plaintiff, a shredded whole wheat biscuit; that the same has always been made from whole wheat of the highest grade and quality and has always been made with great skill and care so as to retain the body and substance of the wheat in said biscuit, and was and is made in buildings and structures specially designed for the purpose and built at great expense and by mechanism also especially designed with particular regard to purity and cleanliness, and in such manner that said shredded whole wheat biscuit passes directly from the factory to the consumer free from contamination by human touch or by odors or any foreign substance; and that during all of said period defendant and its predecessor Kellogg Toasted Corn Flake Company have spent large sums of money in scientific investigation for the purpose of continually maintaining and improving and perfecting the method of manufacture and quality of said biscuit, and that defendant has applied for and secured patents covering new and improved machinery for the manufacture of such shredded wheat biscuit, and has expended large sums of money in all its efforts as above set forth, and in advertising its own special proprietary brands known as Kellogg's Whole Wheat Biscuit and Kellogg's Shredded Whole Wheat Biscuit.

14. That the general shape or design of shredded whole wheat biscuit is an unavoidable result of the process of manufacture of the biscuit as hereinbefore set forth but that defendant for the purpose of imparting a distinctive size and appearance to its biscuit and of improving its qualities, appearance and taste, materially shortened its biscuit as compared with the previously patented biscuit of plaintiff and also caused its biscuit to be toasted or baked on both its bottom and its top as compared with plaintiff's biscuit which is baked only on top, and caused its biscuit to be rounded on the bottom as well as the top as compared with plaintiff's biscuit with its flattened bottom, and defendant also used materially finer shreds in its biscuit, and defendant also enclosed its biscuit in its standard and individual sized cartons, for all of which reasons defendant's biscuit is and was distinctive and readily distinguishable from any other biscuit on the market, until plaintiff, some years after defendant had adopted its peculiar size of biscuit, first began to market a biscuit substantially indistinguishable in size, length and shape from defendant's biscuit, as will hereafter appear.

15. That for the purpose of further distinguishing its biscuits as of its special production, defendant has at all times packed its biscuit in distinctively colored and distinctively shaped cartons prominently marked with the green and red colors which are well known to the trade and the public as associated with defendant's Kellogg's Toasted Corn Flakes and other known cereal products; that said cartons are marked with and dominated by defendant's well known trade-mark Kellogg's and are incapable of being confused with the cartons of any competitor; that defendant's said shredded whole wheat biscuit are packed 15 biscuits to defendant's standard carton with a total net weight of 12½

ounces, and two biscuits to the "individual" or restaurant size of trade-marked cartons.

16. That for the twofold purpose of enabling defendant to distribute its biscuit to consumers in distinctive form, and of also enabling the restaurant and hotel trade to supply customers with individual orders of defendant's biscuit in distinctive cartons, defendant puts up its shredded whole wheat biscuit in what are known to the trade as "individual cartons" as aforesaid, the same being miniature cartons of short length capable of holding only two of defendant's biscuit, and that defendant at all times has actively pushed the distribution and sale of these individual size and distinctively trade-marked cartons, not only by distributing them in very large amounts to individual consumers as samples but also by selling them to the restaurant and hotel trade for direct service to customers in the carton.

17. That the physical characteristics and the toasting or baking and other processes to which shredded wheat biscuit are subjected during their production are such that no practical method of individually and physically marking the biscuit itself has been discovered although many experiments have been undertaken with that end in view and that no method of individually identifying shredded wheat biscuit outside the regular carton (except by shortening the biscuit and/or by double toasting and/or by enclosing two biscuits in an individual size carton), without subjecting defendant's product to a commercial handicap which is equivalent to destruction of defendant's right of free competition with plaintiff, is known to defendant, and that no such method of individually identifying shredded wheat biscuit (except by using individual cartons and making a shorter biscuit, double

toasted as aforesaid) without destruction of the right of free competition, has been suggested by plaintiff to defendant although defendant has requested plaintiff to disclose such a method if it knows one, and defendant has offered to agree with plaintiff to go as far as plaintiff is willing or able to go in so identifying its biscuit outside the carton; and that defendant at all times desires that its biscuit shall go to the final consumer in the restaurant and hotel trade in its individual cartons, and exerts itself in every known way to achieve that end.

18. That defendant fosters and encourages in every way the sale of its distinctive sized and double toasted biscuits in the individual carton containing two biscuits and that plaintiff also offers and supplies its single-toasted, longer biscuit to the trade in individual sized cartons each containing two biscuits, presumably as a means of making unnecessary the servicing of its product outside of its carton and as the only practical means it has been able to devise for bringing its biscuit to the restaurant or hotel consumer in its Niagara Falls carton.

19. That defendant has expended large sums of money in advertising, sampling and distributing its Kellogg's Whole Wheat Biscuit in large and "individual" sized cartons to the trade and to consumers throughout the United States, and that said distinctive size of defendant's double-or-top-and-bottom-toasted biscuit and said distinctive cartons of individual and of standard size, carrying prominently displayed thereon defendant's said exclusive trade name Kellogg's, and said extensive advertising and sampling of defendant's shredded wheat to consumers and the trade throughout the several States, have all had the effect of informing and notifying the trade and the

public alike that shredded whole wheat biscuit are now and for some years past have been obtainable from different and competitive sources of manufacture, and defendant alleges that no consumer of average intelligence would or has confused defendant's regular or individual cartons or defendant's advertisements, or defendant's distinctively shortened and double toasted shredded wheat biscuit with any other cartons, advertisements or shredded wheat biscuit coming from any other source of manufacture, until plaintiff recently began to market a short shredded wheat biscuit obviously copied after defendant's product and substantially indistinguishable therefrom.

20. That at all times since 1910 defendant's predecessor and defendant have had a plant at Battle Creek, Michigan, where said biscuit has been and is being made; that said plant at Battle Creek, Michigan, has been open to the public and the complete process of the manufacture of said biscuit has been disclosed to the public; that in order to assure a complete inspection, defendant's said predecessor and defendant have employed guides at said plant at Battle Creek, Michigan, and said guides conduct all visitors throughout said plant and explain in detail the various processes of manufacture, and that said plant is visited and inspected by many thousand persons annually.

21. That defendant and its said predecessor continuously from 1905 to the present date has been one of the largest producers and distributors among the several states of prepared cereal foods in package form and that defendant's well-known products such as Kellogg's Corn Flakes, Kellogg's Pep Bran Flakes, Kellogg's All Bran, Kellogg's Wheat Krumbles, Kellogg's Rice Krispies, Kellogg's Kaffee Hag Coffee and other Kellogg products have caused defendant to

be well and favorably known throughout the entire grocery trade of the country as one of the largest and best known producers of cereal food products, and that the introduction upon the general grocery market throughout the several States by defendant of its Kellogg's Whole Wheat Biscuit of distinctive size and toasted both on the bottom and the top and marketed in distinctively shaped and specially colored Kellogg's packages of miniature and standard size, and defendant's wide sampling of its shredded wheat product to consumers and its extensive advertising of its whole wheat biscuit, have had the effect of notifying and educating the trade and consumers alike, that shredded wheat biscuit are now being made and extensively marketed by defendant in full, fair and open competition with other sources of production.

22. That from about the year 1918 or 1919 until about the year 1922, defendant's predecessor put up its shredded whole wheat biscuit in cartons bearing prominently displayed on the front and rear face thereof:

Kellogg's
SHREDDED
WHOLE WHEAT
BISCUIT

THE ORIGINAL HAS THIS SIGNATURE

W. K. Kellogg

KELLOGG TOASTED CORN FLAKE CO.
BATTLE CREEK, MICH., and TORONTO, CANADA

Net Weight 12 ounces

23. That from about February, 1927 to about July, 1930, defendant put up its shredded whole wheat biscuit in cartons bearing prominently marked on the front and rear faces thereof:

Kellogg's
SHREDDED
WHOLE WHEAT
BISCUIT

HELP YOURSELF TO HEALTH

W. K. Kellogg
KELLOGG COMPANY
BATTLE CREEK, MICHIGAN

Davenport, Iowa London, England London, Canada
Sydney, Australia

NET WEIGHT 9 OUNCES

24. That from about July 1930, to the present date, defendant has put up its shredded whole wheat biscuit in cartons carrying prominently on one face thereof the words:

Kellogg's
WHOLE WHEAT
BISCUIT

(with picture of two shredded wheat in a dish of cream)

15 biscuits 12½ ounces

CERTIFIED
for
FOOD VALUE

and on the other face thereof

Kellogg's
WHOLE WHEAT
BISCUIT

(with picture of two shredded wheat in a dish of cream)

CERTIFIED
for
FOOD VALUE

MADE OF DELICIOUSLY FLAVORED WHOLE WHEAT SHREDS,
DOUBLE TOASTED.

25. That from about July, 1930, until the present date, defendant has continued to put up its shredded whole wheat biscuit in cartons marked prominently on the face and rear thereof as "Kellogg's Shredded Whole Wheat Biscuit, W. K. Kellogg, Kellogg Company, Battle Creek, Michigan," and that defendant from March, 1928 to July, 1930, as far as possible in the face of plaintiff's illegal monopoly practices, distributed its "Kellogg's Shredded Whole Wheat Biscuit" throughout the channels of trade among the several States, but that from approximately July, 1930, until the present date, defendant by reason of the unlawful monopoly, threats, claims and practices of the plaintiff, as hereinafter set forth, has marketed its said "Kellogg's Shredded Whole Wheat Biscuit" in said "Kellogg's Shredded Whole Wheat Biscuit" cartons only in a small way and solely for the purpose of asserting and maintaining its lawful right to market its said biscuit among the several States under said name "Kellogg's Shredded Whole Wheat Biscuit" until it could be freed from the unlawful threats and monopolistic claims, demands and practices of the plaintiff and be enabled to resume the sale thereof on a regular commercial scale.

26. That notwithstanding defendant's rights and its persistent efforts to engage in fair and lawful competition in the sale of its distinctively sized, top-and-bottom toasted biscuit in its regular and individually sized and distinctively colored and trade-marked cartons, plaintiff has persistently, unfairly and unlawfully acted and contrived to prevent defendant from making or selling its biscuit and to intimidate and coerce the trade and others so as to cause them to refuse to buy, handle or sell defendant's biscuit for fear of being sued or otherwise prosecuted by plaintiff.

27. That plaintiff and its said predecessors, long after the expiration of the patents aforesaid of its predecessors, has acted in every way to assert and maintain a complete but unlawful monopoly in shredded wheat among the several States, embracing and including therein:

1. the exclusive right to make and vend throughout the several States, wheat biscuit made in the aforesaid particular, and allegedly distinctive shape, appearance and structure as disclosed and claimed in said expired Perky patents as aforesaid.

2. the exclusive right in and to the names "Shredded" and "Shredded Wheat" in connection with said shredded whole wheat biscuit throughout the United States and among the several States.

3. the exclusive right in and to the representation or picture of said shredded whole wheat biscuit made in said allegedly distinctive shape, appearance and structure throughout the several States.

4. the exclusive right in and to the representation of said shredded wheat biscuit of allegedly particular and distinctive shape, appearance or structure placed in a dish throughout the several States.

28. That the creation and maintenance by plaintiff throughout the trade within the several States, of a monopoly of the nature above outlined constitutes a bar to the lawful entry into said trade of other manufacturers as competitors of plaintiff, in that said monopoly and its enforcement acts to deter and has the effect of deterring defendant from making said patented shredded wheat biscuit or from calling it by its

true and descriptive name, or from making true and exact pictures of it alone or in a plate, and it also deters the trade and consumers from buying, handling or selling defendant's product, and generally throws over defendant's business and customers, a paralysis of threat, coercion, intimidation and unfair competition.

29. That the methods devised and pursued by plaintiff and its predecessors for setting up and maintaining this complete and unlawful monopoly in a patent-expired product, and in its pictorial representation have been to claim the before-described wide and exclusive rights and to threaten the trade into refusing to handle or into boycotting defendant's competing product; and that in pursuance of said unlawful monopoly, plaintiff has made unlawful registrations in the Patent Office of the name "Shredded Wheat" as an exclusive trade mark not susceptible of lawful use by others in any way whatever; and plaintiff has repeatedly warned and threatened defendant with litigation in advance of its entry into the field in a fair and lawful way; and has brought suit against defendant and permitted it to drag untied, while spreading all kinds of threatening propaganda by word of mouth and otherwise against defendant throughout the trade to convince the dealers and consumers that defendant's goods are outlaw products of a spurious nature and that it is dangerous to carry them, push their sale or consume them.

30. That plaintiff has registered in the United Patent Office and elsewhere as its exclusive trademark the words "Shredded Wheat," as shown by the following trademark registrations in the United States Patent Office:

1. Certificate No. 178,725 (Act of March 19, 1920), issued January 15, 1924, claiming as a trademark the words "Shredded Wheat" and stating

that "The trademark has been continuously used and applied to said goods in applicant's business since January first, 1894."

2. Certificate No. 89071 issued November 5, 1912 "for shredded wheat in class 46, Foods and ingredients of foods" covering a picture of a food factory and stating that "no claim is made herein to the words 'The Home of Shredded Wheat'."

3. Certificate No. 85,186 issued January 30, 1912, illustrating a plate and spoon and stating "no claim being made to the representation of a shredded wheat biscuit."

4. Certificate No. 216,593, issued August 17, 1926, illustrating a plate of shredded wheat.

5. Certificate No. 213,456, issued May 25, 1926, on the words "Shredded Wheat" claimed as an exclusive trademark used since January 1, 1894. Copies of said registrations are attached hereto.

30-a. That said registrations and each of them are void, unlawful, against public policy, monopolistic, fraudulent, in view of previous denial of registration, unfair, oppressive of defendant and others, a burden upon interstate commerce, and an unlawful restriction upon the rights of defendant and others.

31. That plaintiff and its predecessors, by threats and notices and by claims of exclusive and other rights and by threats of litigation and other acts of coercion, and by changing its corporate name, on May 15, 1908, from The Natural Food Company to the Shredded Wheat Company, has endeavored to deter defendant and others from entering into competition with plaintiff at a time both before and after plaintiff regarded said competition as prospective or tentative rather than actual.

32. That about 1921 defendant started manufacturing its short-sized shredded whole wheat biscuit and had invested large sums of money in the machinery for producing the same and that in or about February, 1922, plaintiff's predecessor notified defendant of their claimed exclusive rights in and to shredded wheat biscuit of the form, size, and style manufactured by them and of the name shredded wheat, and by reason of this notice and of the threats and coercive measures employed by plaintiff, defendant was forced, against its will, to cease to market its shredded wheat biscuit and did so cease.

33. That defendant continued to be restrained by said unlawful threats of plaintiff until about the year 1927 when defendant again prepared actively to enter the market as manufacturer of its distinctively sized biscuit in cartons, distinctively colored and trade-marked, and that in or about the month of February, 1927, defendant introduced its said product upon the market in full, free and fair competition with plaintiff.

34. That in or about April, 1927, plaintiff again threatened defendant and its trade customers with litigation and other coercive measures on account of its manufacture of patent-expired shredded wheat; that defendant refused longer to be deterred by these threats; that plaintiff thereupon, in or about the early part of 1928, instituted suit against certain of defendant's customers in the United States District Court for the District of Connecticut; and that upon the institution of such action, plaintiff instigated and fostered throughout the press of the country a series of newspaper and magazine attacks upon defendant, designed to create and actually creating the impression that defendant's distinctive sized, top-and-bottom toasted and distinctively cartoned shredded wheat biscuit was an outlaw product and that penalties would be incurred

by all of those who bought, sold or otherwise dealt in and with the same; that plaintiff's agents and salesmen thereupon began and continued to defame, slander and attack defendant and its said distinctive shredded wheat biscuit in the market and to threaten and coerce defendant's dealers and the trade with litigation and other oppressive and monopoly methods.

34-a. That plaintiff failed and neglected to bring said suit to trial although the cause had been long at issue and that in or about the month of July, 1930, as the result of the threatening and damaging acts and monopoly claims and trade oppressions of plaintiff and its agent as aforesaid, and on account of the resulting trade resistance to the marketing and sale of defendant's said shredded wheat biscuits as directly resulting from and produced by plaintiff's said threats and other wrongful acts as aforesaid, defendant, under force of said threats and monopoly acts, and without prejudice to its rights in the matter, changed the name of its shredded wheat biscuit from "Kellogg's Shredded Whole Wheat Biscuit" to "Kellogg's Whole Wheat Biscuit" and defendant, since July, 1930, has continued to market its product as "Kellogg's Whole Wheat Biscuit" while continuing to sell its "Kellogg Shredded Whole Wheat Biscuit" only in such nominal amounts as would serve to assert, protect and reserve its right to market its product as shredded wheat.

35. That plaintiff thereupon dismissed, without prejudice, the suit theretofore pending in Connecticut against certain defendants who had purchased and resold defendant's shredded wheat product, and that defendant had not appeared in or become a party to said suit, the court having no jurisdiction over defendant therein.

36. That in or about the Spring of 1932 plaintiff, in pursuance of its said attempt unlawfully to monop-

size interstate commerce in shredded wheat biscuits and to oppress and injure defendant, produced and began to sell and market a new size of biscuit, which, on information and belief, was designed by plaintiff to be substantially indistinguishable from defendant's regular size of biscuit and is in fact substantially indistinguishable in size from defendant's said biscuit, and that plaintiff, by this act, sought purposely to wipe out and in fact did wipe out the theretofore existing clear and substantial size distinction between defendant's and plaintiff's biscuit, and plaintiff thus purposely, maliciously and in pursuance of its scheme of unlawful monopoly, oppression and unfair competition placed into the channels of trade a shredded wheat biscuit designed by plaintiff to be, and capable of being, unfairly substituted by designing persons for defendant's biscuit by removing the same from their cartons.

37. That in further pursuance of said illegal attempt to monopolize interstate commerce in shredded wheat and to oppress defendant, plaintiff has recently employed as its sales manager in charge of sales of shredded wheat a former general sales manager of defendant's at the time of the former litigation aforesaid, and that at or about the time of plaintiff's said employment of defendant's former general sales manager, and of plaintiff's putting out of a biscuit approximately equal to defendant's biscuit in size, plaintiff instituted this new suit in equity against defendant in the U. S. District Court for the District of Delaware, setting up the monopoly claims as aforesaid and at the same time renewing in the trade its unfair, slanderous, threatening and coercive attacks upon defendant, its shredded wheat product and its dealers, and that said attacks upon its shredded wheat product and dealers therein have since continued and have been and are damaging to defendant, its reputation and business.

38. That by reason of the unlawful acts of plaintiff as aforesaid defendant has been unlawfully damaged in an amount in excess of one million dollars.

WHEREFORE defendant prays that the bill of complaint may be dismissed with costs to defendant to be taxed.

KELLOGG COMPANY,

— (Sgd.) By W. K. KELLOGG,
(Corporate Seal) President.

(Sgd.) E. ENNALLS BERL,
Solicitor for Defendant.

(Sgd.) CRICHTON CLARKE,
Attorney and Counsel for Defendant,
71 West 23d Street,
New York, New York.

VERIFICATION.

STATE OF MICHIGAN, }
COUNTY OF CALHOUN, } ss.:

W. K. KELLOGG, being duly sworn, deposes and says that he is the president of Kellogg Company, the defendant named in the foregoing answer; that he has read the said answer and that the facts therein stated are true to his own knowledge, except as to such facts as may be stated on information and belief, and as to such facts he believes it to be true; and that the reason why this verification is not made by the defendant personally is that defendant is a corporation of which affiant is a duly qualified officer.

(Sgd.) W. K. KELLOGG.

Subscribed and sworn to before me this fifth day of August, A. D. 1932.

(Sgd.) THERESA F. GIBBONS,
(Seal) Notary Public.

My commission expires December 3, 1933.

**PLAINTIFF'S REPLY TO DEFENDANT'S
AFFIRMATIVE DEFENSE.**

(Filed August 30, 1932.)

Reply of plaintiff, National Biscuit Company, to the affirmative defense of defendant, Kellogg Company.

1. Plaintiff admits the allegations contained in paragraph numbered "1" of defendant's answer.

2. Plaintiff admits the allegations contained in paragraph numbered "2" of defendant's answer.

3. Plaintiff, for reply to the allegations contained in paragraph numbered "3" of defendant's answer, admits that its predecessors and it have been and are engaged in the manufacture and sale of a whole wheat biscuit; that its said biscuit has been known as "Shredded Whole Wheat" and "Shredded Wheat"; that Letters Patent of the United States No. 548,086 was granted in October, 1895, to Henry D. Perky; that said Letters Patent No. 548,086 was the property of plaintiff's predecessors, Cereal Machine Company, a Colorado corporation (the name of which was duly changed to Shredded Wheat Company) and The Natural Food Company, a New York corporation (the name of which was duly changed to The Shredded Wheat Company); that said Henry D. Perky was the original promoter of the said enterprise and that it was heretofore conducted by plaintiff's predecessors and is now being conducted by plaintiff, but it denies the conclusions and any other allegations contained therein.

4. Plaintiff denies the allegations contained in paragraph numbered "4" of defendant's answer in the manner and form pleaded, and alleges that its

predecessors were vested with title to Perky United States Patent No. 548,086 and that the process for manufacture thereunder was as disclosed in said letters patent, a copy of which is attached hereto.

5. Plaintiff, for reply to the allegations contained in paragraph numbered "5" of defendant's answer, admits that design Letters Patent of the United States No. 24,668 was issued on September 17, 1895 on the invention of and to Henry D. Perky, but it denies that the design of the biscuit shown in said patent resulted necessarily from the process of manufacture.

6. Plaintiff, for reply to the allegations contained in paragraph numbered "6" of defendant's answer, admits the allegations contained therein except as to the year and avers that the business of said Cereal Machine Company in the manufacture and sale of said product was begun in the year 1893.

7. Plaintiff, for reply to paragraph numbered "7" of defendant's answer, admits the allegations contained therein, except that the numbers of the following letters patent recited therein are incorrect: 571,285, 884,788, 681,656, 713,793, and alleges that the correct numbers of said letters patent are 571,235, 684,788, 681,655 and 713,795, respectively.

8. Plaintiff, for reply to paragraph numbered "8" of defendant's answer, admits that Letters Patent of the United States identified therein, No. 548,086 and No. 548,087, have expired; that the terms of all of the other letters patent set forth in paragraph numbered "7" of defendant's answer have also expired but it is not informed and therefore denies the conclusion that the subject matter thereof has fallen into the public domain and alleges that because of the

long and continued manufacture and sale of plaintiff's said whole wheat biscuit which has been carried on continuously since the year 1893, and which was carried on without material alteration or change in distinctive and peculiar shape and appearance and without competition with other manufacturers prior to and from and after the expiration of the letters patent enumerated in paragraph numbered "7" of defendant's answer and because, since the expiration of each of said letters patent, the public has continued and now continues to associate the said biscuit of plaintiff of distinctive and peculiar shape and appearance as of the origin, manufacture and sale of plaintiff, plaintiff is vested with the exclusive right to manufacture and sell its said whole wheat biscuit made in said distinctive and peculiar shape and appearance.

9. Plaintiff, for reply to the allegations contained in paragraph numbered "9" of defendant's answer, denies the allegations contained therein that in letters patent, trade-mark registrations and advertisements of plaintiff's predecessors, during the terms of the letters patent enumerated in paragraph numbered "7" of defendant's answer, the words "Shredded Wheat" and "Shredded Whole Wheat Biscuit" were used by said Henry D. Perky and by plaintiff's predecessors as designative of plaintiff's said shredded whole wheat biscuit; denies the other allegations contained therein but admits that the United States Patent Office and the Court of Appeals of the District of Columbia in a suit in which plaintiff's predecessor was a party made a ruling that the words "Shredded Whole Wheat" were descriptive of the shredded whole wheat biscuit produced by plaintiff's predecessor; and alleges that plaintiff's predecessor and plaintiff have continued to use the words and terms "Shredded Whole Wheat Biscuit", "Shredded Wheat Biscuit"

and "Whole Wheat" in connection with and to designate the origin of the said biscuit of distinctive and peculiar shape and appearance from and after the expiration of the letters patent identified in paragraph numbered "7" of defendant's answer and that the use of the said words and terms by plaintiff's predecessors and plaintiff has been exclusive except for the use thereof or parts thereof by defendant in unfair and wrongful competition with plaintiff and that the origin of plaintiff's said biscuit is known to the trade and public by said words or terms.

10. Plaintiff, for reply to the allegations contained in paragraph numbered "10" of defendant's answer, admits that the letters patent of plaintiff's predecessors enumerated in paragraph numbered "7" of defendant's answer gave to plaintiff's said predecessors a substantial monopoly in the apparatus, products and processes covered thereby and that the words "Shredded Wheat" and/or "Shredded Whole Wheat Biscuit" came actually to indicate the class and type of product made by plaintiff's said predecessors but it denies that said terms "Shredded Wheat" and/or "Shredded Whole Wheat Biscuit" constitute the true and generic description of said product or that said words were used in that sense by plaintiff's predecessors and others, but alleges that said terms "Shredded Wheat" and "Shredded Whole Wheat Biscuit" were and are now employed by plaintiff and are known to and by the public as the marks or indicia of origin of the said whole wheat biscuit of plaintiff of distinctive and peculiar shape and appearance.

11. Plaintiff, for reply to the allegations contained in paragraph numbered "11" of defendant's answer, admits that all of the letters patent identified in paragraph numbered "7" of defendant's answer have expired but it denies each and every of the other

allegations contained therein and alleges that by reason of the long and continued use of the terms "Shredded Wheat" and "Shredded Whole Wheat Biscuit" and continuation thereof, subsequent to the expiration of the said letters patent identified in paragraph numbered "7" of defendant's answer, to identify and designate the said whole wheat biscuit of plaintiff's predecessors and plaintiff made in distinctive and peculiar shape and appearance, without competition with any other manufacturer or manufacturers, have been employed to designate plaintiff as the source or origin of the said biscuit of distinctive and peculiar shape and appearance and that the public knows and understands the said terms as indicating the origin in plaintiff of plaintiff's said biscuit.

12. Plaintiff, on information and belief, denies each and every of the allegations contained in paragraph numbered "12" of defendant's answer.

13. Plaintiff, for reply to the allegations contained in paragraph numbered "13" of defendant's answer, denies, on information and belief, that "defendant's efforts to enter into free and fair competition in the manufacture and sale of shredded wheat have been continuously exerted since a period long prior to January, 1923"; admits that defendant has prepared for the manufacture and has manufactured and sold to the public a shredded whole wheat biscuit but it denies that it (plaintiff) has by unlawful act or otherwise interfered with and impeded the business of defendant; admits that defendant has advertised its whole wheat biscuit as "Kellogg's Whole Wheat Biscuit" and "Kellogg's Shredded Whole Wheat Biscuit" but it has no knowledge of the other allegations contained in said paragraph of defendant's answer and therefore denies the same.

14. Plaintiff, for reply to the allegations contained in paragraph numbered "14" of defendant's answer, denies that the general shape or design of the shredded whole wheat biscuit is an inevitable result of the process of manufacture of the biscuit, but plaintiff is not informed as to the other allegations contained in said paragraph of the answer of defendant and therefore denies the same.

15. Plaintiff, for reply to the allegations contained in paragraph numbered "15" of defendant's answer, admits that defendant's whole wheat biscuit are packed fifteen biscuit in a carton with a total net weight of 12½ ounces and two biscuit to the "individual" or so-called restaurant size; but plaintiff is not informed as to the other allegations contained in said paragraph of defendant's answer and therefore denies the same.

16. Plaintiff, for reply to the allegations contained in paragraph numbered "16" of defendant's answer, admits that defendant has packaged its whole wheat biscuit in so-called individual cartons containing two biscuit in each but it has no information as to the other allegations contained in said paragraph and therefore denies the same and alleges that from in and prior to the year 1910 and continuously thereafter plaintiff's predecessor and plaintiff have and are now packaging their said whole wheat biscuit in so-called individual cartons containing two biscuit in each.

17. Plaintiff denies each and every of the allegations contained in paragraph numbered "17" of defendant's answer and alleges that any person, firm or corporation desiring to manufacture a whole wheat biscuit could produce the same in form and appearance readily and easily distinguishable from the biscuit of the manufacture of plaintiff's predecessors and plain-

tiff of distinctive and peculiar shape and appearance and could, if desired, suitably mark the said biscuit to designate the origin of manufacture thereof.

18. Plaintiff, for reply to the allegations contained in paragraph numbered "18" of the answer of defendant, admits that defendant encourages the sale of its biscuit in individual cartons and that plaintiff in the conduct of its business encourages the sale of its said biscuit in individual cartons but denies each and every of the other allegations contained therein.

19. Plaintiff is without knowledge as to the allegations contained in paragraph numbered "19" of defendant's answer and therefore denies the same.

20. Plaintiff, on information and belief, admits that defendant has a plant at Battle Creek, Michigan, but it is without knowledge as to the other allegations contained in paragraph numbered "20" of defendant's answer and therefore denies the same.

21. Plaintiff, for reply to the allegations contained in paragraph numbered "21" of defendant's answer admits that defendant has been a producer and distributor of products identified therein but it is not informed that plaintiff is one of the largest producers of such products and therefore denies the same and it denies each and every of the other allegations contained in the said paragraph of defendant's answer.

22. Plaintiff, for reply to the allegations contained in paragraph numbered "22" of defendant's answer, admits that defendant's predecessor put up shredded whole wheat biscuit in cartons bearing the marking set forth in said paragraph of defendant's answer but it alleges that the use of the words or terms "Shredded" and "Shredded Whole Wheat" upon its cartons containing said product was a palpable violation and invasion of plaintiff's rights in and to the

words "Shredded" and "Shredded Whole Wheat" for shredded whole wheat made and formed in said biscuit form, and that defendant discontinued the use thereof upon notice from plaintiff's predecessor of defendant's invasion of the rights of plaintiff's predecessor.

23. Plaintiff, for reply to the allegations contained in paragraph numbered "23" of defendant's answer admits that defendant put up shredded whole wheat biscuit in cartons bearing the marking set forth in the said paragraph of defendant's answer but plaintiff alleges that the use of the words or terms "Shredded" and "Shredded Whole Wheat" thereon was a palpable violation and invasion of the rights of plaintiff in and to the said words or terms for shredded whole wheat made and formed in said biscuit form, and that defendant discontinued the same after receipt of notice from plaintiff's predecessor of defendant's invasion of the rights of plaintiff's predecessor.

24. Plaintiff, for reply to the allegations contained in paragraph numbered "24" of defendant's answer, admits that defendant put up shredded whole wheat biscuit in cartons bearing the marking stated therein but it alleges that the use of the indicia or term "Whole Wheat" in association with the picture of two said shredded wheat biscuit in a dish of cream by defendant were so employed by defendant in violation of the rights of plaintiff which are complained of in this suit.

25. Plaintiff, for reply to the allegations contained in paragraph numbered "25" of defendant's answer, admits that defendant, from and after July, 1930, put up, and is now putting up a shredded whole wheat biscuit in cartons and that marked prominently on the face and rear of its cartons are the words "Shredded Whole Wheat Biscuit"; that from March, 1928, to July, 1930, defendant distributed a shredded whole wheat

biscuit in the channels of trade among the several States of the United States packed in cartons on which were marked, on the face and rear thereof, the words "Shredded Whole Wheat Biscuit" and that, from approximately, July, 1930, and continuously and at this time, defendant is manufacturing and selling a shredded whole wheat biscuit which it packs in cartons and marks with the words "Shredded Whole Wheat Biscuit" but plaintiff denies each and every of the other allegations contained in the said paragraph of defendant's answer, and alleges that defendant employs upon the cartons in which its said biscuit are packed the word "shredded" and the word "shreds."

26. Plaintiff denies each and every of the allegations contained in paragraph numbered "26" of defendant's answer.

27. Plaintiff, for reply to the allegations contained in paragraph numbered "27" of defendant's answer, denies that it has acted to assert and maintain its rights in an unlawful manner as an "unlawful monopoly" and the conclusion that plaintiff's said biscuit of distinctive and peculiar shape and appearance was "disclosed and claimed in said expired Perky patents as aforesaid" but it admits each and every of the other allegations contained in the said paragraph of defendant's answer.

28. Plaintiff denies each and every of the allegations contained in paragraph "28" of defendant's answer.

29. Plaintiff denies each and every of the allegations contained in paragraph numbered "29" of defendant's answer.

30. Plaintiff admits each and every of the allegations contained in paragraph numbered "30" of defendant's answer.

31. Plaintiff denies each and every of the allegations contained in paragraph numbered "30a" of defendant's answer.

32. Plaintiff denies each and every of the allegations contained in paragraph numbered "31" of defendant's answer but alleges that it does by this cause endeavor to restrain defendant from its wrongful invasion of its established rights.

33. Plaintiff, for reply to the allegations contained in paragraph numbered "32" of defendant's answer, admits that in or about 1921 defendant started manufacturing a shredded wheat biscuit; that in or about February, 1922, plaintiff's predecessor notified defendant of its exclusive rights in and to the shredded wheat biscuit of the form, size and style manufactured by it and of the name "Shredded Wheat," and that by reason of said notice defendant ceased to market said shredded wheat biscuit but plaintiff denies each and every of the other allegations contained in said paragraph of defendant's answer.

34. Plaintiff, for reply to the allegations contained in paragraph numbered "33" of defendant's answer, admits that from about the year 1922 until the year 1927 defendant did not market a whole wheat biscuit but that in the year 1927 defendant began to market a whole wheat biscuit but plaintiff denies each and every of the other allegations contained in said paragraph of defendant's answer.

35. Plaintiff, for reply to the allegations contained in paragraph numbered "34" of defendant's answer, admits that in or about the early part of 1928 its predecessor instituted a suit against defendant and certain of defendant's customers in the District Court of the United States for the District of Connecticut to restrain unfair competition in the marketing of defendant's

whole wheat biscuit but plaintiff denies each and every of the other allegations contained in said paragraph numbered "34" of defendant's answer.

36. Plaintiff, for reply to the allegations contained in paragraph numbered "34a" of defendant's answer, admits that the said suit referred to in paragraph "34" of defendant's answer was not tried on final hearing; that defendant changed the name of its shredded wheat biscuit from "Kellogg's Shredded Whole Wheat Biscuit" to "Kellogg's Whole Wheat Biscuit"; that since July, 1930, defendant has continued to market its product as "Kellogg's Whole Wheat Biscuit" and "Kellogg's Shredded Whole Wheat Biscuit" but it denies each and every of the other allegations contained in said paragraph numbered "34a" of defendant's answer, and alleges that defendant did not wholly cease or desist the use of the word "Shredded" or "shreds" in connection with the sale of its said whole wheat biscuit.

37. Plaintiff, for reply to the allegations contained in paragraph numbered "35" of defendant's answer, admits that the said suit referred to in paragraph numbered "34" of defendant's answer was dismissed, without prejudice; that said suit was brought against defendant herein and other defendants who purchased and resold defendant's shredded whole wheat biscuit; that defendant in this case was named as a party defendant in said suit, and took charge of the defense of the said suit by counsel of its selection; that said suit was discontinued without prejudice on written stipulation providing that should plaintiff or its successors desire or find it necessary to sue again upon the same cause of action or to bring any other litigation involving the same or related subject matter against defendants in said case or their successors, representatives, agents or privies the proceedings, order, testimony or

depositions taken therein may be used to the same extent and for the same purpose as though the same had been taken, had or done in such further litigation; and that defendant was a party to and duly signed the said stipulation.

38. Plaintiff denies each and every of the allegations contained in paragraph numbered "36" of defendant's answer and alleges that since on or about the year 1932 plaintiff has manufactured and marketed a shredded whole wheat biscuit which is smaller in size than its said whole wheat biscuit of distinctive and peculiar shape and appearance, and that the said smaller biscuit of the manufacture and sale of plaintiff's predecessor and plaintiff was made in the same distinctive and peculiar shape and appearance as the said larger biscuit of plaintiff's predecessors and plaintiff.

39. Plaintiff denies the allegations contained in paragraph numbered "37" of defendant's answer except that it admits the institution of this suit and alleges that defendant's former general sales manager referred to in the said paragraph of defendant's answer was employed by plaintiff's predecessor from on or about July, 1900, until in or about December, 1910; that, on information and belief, defendant induced its said former general sales manager to leave the employ of plaintiff's predecessor and to accept employment with defendant; that said former general sales manager of defendant was employed by defendant from in or about December, 1910, to in or about November, 1928; that in or about November, 1928, defendant discharged its said former general sales manager; that thereafter, defendant's said former sales manager was employed by others in no manner related or connected with plaintiff and that thereafter, in or about the month of April, 1932, defendant's said former sales manager became and now is employed by plaintiff.

40. Plaintiff denies the allegations contained in paragraph numbered "38" of defendant's answer.

NATIONAL BISCUIT COMPANY,

By (Sgd.) C. F. BLISS,
Vice-President.

(Sgd.) HUGH M. MORRIS,
Solicitor for Plaintiff,
Dupont Building,
Wilmington, Delaware.

DEURY W. COOPER,
C. A. VILAS,
HUGH M. MORRIS,
Of Counsel.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

C. F. BLISS, being duly sworn deposes and says that he is vice-president of National Biscuit Company, the plaintiff named in the above-identified case; that he has read the foregoing reply to defendant's affirmative defense and that the facts therein stated are true to his own knowledge except as to such facts as may be stated on information and belief, and as to such facts he believes it to be true; and the reason why this verification is not made by plaintiff personally is that plaintiff is a corporation of which affiant is a duly qualified officer.

(Sgd.) C. F. BLISS.

Subscribed and sworn to before me this twenty-ninth day of August, 1932.

(Sgd.) A. T. BULLOCK.

Notary Public, Queens Co. No. 230.

Registered in Queens Co. No. 22.

Certificate filed in New York Co. No. 12.

Registered in New York Co. No. 4-B-6.

Commission expires March 30, 1934.

UNITED STATES PATENT OFFICE.

HENRY D. PERKY, OF DENVER, COLORADO.

BREAD AND METHOD OF PREPARING SAME.

SPECIFICATION forming part of Letters Patent No. 548,098, dated October 15, 1895.

Application filed March 15, 1894. Serial No. 502,777. (No specimens.)

To all whom it may concern:

Be it known that I, HENRY D. PERKY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Article of Food or Bread and the Preparation of the Same; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

An object of the invention is the production of an article of food or bread, consisting of externally rough porous threads or filaments of wheat or similar grain, having the outer nutrition bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain-berries and their rough and porous thread-like or shred-like form to constitute, without other shortening or aeration, bread of especially light and wholesome character.

A further object of the invention consists in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of experts or skilled labor now required to produce palatable bread.

The usual methods practiced in the manufacture of flour and the resultant bread therefrom are such as to detract from the natural and healthful properties possessed by the grain in its original state. The addition of shortening, yeast, baking-powder, alum, or other foreign ingredients to render the bread light is also detrimental, and the entire method consumes a large amount of time and labor.

According to the improved method which I am now about to describe, the wheat is taken in the whole or berry form, and after being cleaned and thoroughly washed is boiled until corked, without destroying the whole or individual form of the berry. The time of boiling is usually about one hour. This op-

and adherent extraneous matter. It also destroys all insect life and removes the traces thereof. Before removal from the boiler the grain is seasoned with salt. The wheat, still in berry form, is, nevertheless, just after the boiling quite soft and its interior or starchy portion especially is watery. It can be easily mashed between the finger and thumb and is not in condition for proper compression until its inner and outer portions are brought more upon an equality in point of consistence. To this end the grain, being removed from the boiler, is allowed to dry for some hours—from twelve to twenty hours being usually sufficient—until the interior of the berry has, from the loss of some of its water, become more consistent. The grain should be constantly stirred or agitated during this part of the process to hasten the drying-out action and to prevent incipient fermentation. I prefer, therefore, to dry out the grain in rotating wire-cloth barrels or cage-tumblers. The berries should now have sufficient interior consistence to enable their outer and interior portions to be effectively incorporated with each other, such incorporation being accomplished by passing the grain between compression-rollers, one or both of which is provided with a series of fine circumferential grooves whereby the berries are mashed and their outer bran-coats, gluten layers, and starchy interior portion thoroughly incorporated together and forced into the grooves of the roller or rollers, whence the resultant food is discharged, by means of a comb or scraper, in the form of long fine filaments or threads of porous character and having a rough exterior admirably adapted to cause them to adhere together when being massed to form loaves or biscuit. The sinuous form and rough or jagged exterior shape of the filaments is designed also to provide small interstices throughout the mass, whereby the bread is thoroughly aerated and made very light.

The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. The food presented is pure wheat and all the parts of the berry are given to the consumer in a form. No chemical change is

BREAD AND METHOD OF PREPARING SAME.

SPECIFICATION forming part of Letters Patent No. 548,088, dated October 15, 1896.

Application filed March 15, 1894. Serial No. 503,777. (No specimen.)

To all whom it may concern:

Be it known that I, HENRY D. PERRY, a citizen of the United States, and a resident of Denver, in the county of Arapahoe and State of Colorado, have invented a certain new and useful Article of Food or Bread and the Preparation of the Same; and I do declare the following to be a full, clear, and exact description of the invention, such as will enable others skilled in the art to which it appertains to make and use the same.

An object of the invention is the production of an article of food or bread, consisting of externally-rough porous threads or filaments of wheat or similar grain, having the outer striction bran and gluten of the entire berry visibly mingled with the interior starchy portion thereof and adapted by their composition of entire grain-berry and their rough and porous thread-like or shred-like form to constitute, without other shortening or aeration, bread of especially light and wholesome character.

A further object of the invention consists in the novel art or method of preparing the grain or berry and reducing it to form without taking from the grain any of the beneficial qualities provided by nature and presenting the same in convenient form for service as a superior article of food without the aid of expert or skilled labor now required to produce palatable bread.

The usual methods practiced in the manufacture of flour and the resultant bread therefrom are such as to detract from the natural and healthful properties possessed by the grain in its original state. The addition of shortening, yeast, baking-powder, alum, or other foreign ingredients to render the bread light is also detrimental, and the entire method consumes a large amount of time and labor.

According to the improved method which I am now about to describe, the wheat is taken in the whole or berry form, and after being cleaned and thoroughly washed is boiled until cooked, without destroying the whole or individual form of the berry. The time of boiling is usually about one hour. This operation, in addition to cooking the grains, removes from them the outer silicious coating

and adherent extraneous matter. It also destroys all insect life and removes the traces thereof. Before removal from the boiler the grain is seasoned with salt. The wheat, still in berry form, is, nevertheless, just after the boiling quite soft and its interior or starchy portion especially is watery. It can be easily mashed between the finger and thumb and is not in condition for proper compression until its inner and outer portions are brought more upon an equality in point of consistence. To this end the grain, being removed from the boiler, is allowed to dry for some hours—from twelve to twenty hours being usually sufficient—until the interior of the berry has, from the loss of some of its water, become more consistent. The grain should be constantly stirred or agitated during this part of the process to hasten the drying-out action and to prevent incipient fermentation. I prefer, therefore, to dry out the grain in rotating wire-cloth barrels or cage-tumblers. The berries should now have sufficient interior consistence to enable their outer and interior portions to be effectively incorporated with each other, such incorporation being accomplished by passing the grain between compression-rollers, one or both of which is provided with a series of fine circumferential grooves whereby the berries are mashed and their outer bran-coats, gluten layers, and starchy interior portion thoroughly incorporated together and forced into the grooves of the roller or rollers, whence the resultant food is discharged, by means of a comb or scraper, in the form of long fine filaments or threads of porous character and having a rough exterior admirably adapted to cause them to adhere together when being massed to form loaves or biscuit. The sinuous form and rough or jagged exterior shape of the filaments is designed also to provide small interstices throughout the mass, whereby the bread is thoroughly aerated and made very light. The food as discharged from the rolls is ready for use without further cooking, or it can be shaped for baking in various ways. The food presented is pure wheat and all the parts of the berry are given to the consumer in attractive form. No chemical change is set up therein by the use of ferments or other

foreign ingredients, and the percentage of water in the food is much less than in ordinary bread.

The article as produced is a food or bread composed of superposed or massed layers or deposits of dry, externally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material or their products.

The fine thread-like character of the component filaments of the bread and their disposition therein renders it tender, so that shortening is not required. All the nutrition and beneficial qualities of the berry are preserved in this admirable article of food, while its form gives it tenderness and lightness without the admixture of foreign ingredients.

Having described this invention, what I claim, and desire to secure by Letters Patent, is—

1. A food or bread composed of superposed or massed layers or deposits of dry, exter-

nally rough, porous, sinuous threads or filaments of cooked whole wheat containing intermixed the bran, starch, and gluten of the entire berry, and which is absolutely free from leavening or raising material, or their products.

2. The process of reducing cereals for food, consisting, first, in cooking the grain with salt, after it has been thoroughly cleaned, without destroying the whole berry form, second, partially drying the grain with constant agitation until its interior and exterior portions are of substantially the same consistency, and finally, compressing the grain to intimately commingle the outer or bran coats, gluten layers, and starchy, interior portions in the form of porous, rough filaments or threads, substantially as described.

In testimony whereof I affix my signature in the presence of two witnesses:

HENRY D. PERKY.

Witnesses:

J. M. STANLEY,
HARRY C. JAMES.

Correction to Letters Patent No. 548,086.

It is hereby certified that in Letters Patent No. 548,086, granted October 15, 1895, upon the application of Henry D. Perky, of Denver, Colorado, for an improvement in "Bread and Methods of Preparing Same," an error appears in the printed specification requiring correction, viz: In line 47, page 1, the word "corked" should read *cooked*; and that the said Letters Patent should be read with this correction therein that the same may conform to the record of the case in the Patent Office.

Signed, countersigned, and sealed this 29th day of October, A. D. 1895.

[SEAL.]

JNO. M. REYNOLDS,
Assistant Secretary of the Interior.

Countersigned:

S. T. FISHER,
Acting Commissioner of Patents.

**PLAINTIFF'S INTERROGATORIES AND
DEFENDANT'S ANSWERS THERETO.**

(Interrogatories Filed December 27, 1932.)

(Answers Filed May 22, 1933.)

Interrogatory No. 1. When did defendant or its predecessor, if any, first begin the manufacture and sale in the United States of a whole wheat edible product?

Answer: Year 1912.

Interrogatory No. 2. State when the manufacture, sale and distribution in commerce in the United States of the whole wheat product, inquired about in interrogatory numbered "1," was discontinued.

Answer: Year 1920.

Interrogatory No. 3. Did defendant or its predecessor cook the whole wheat used in the edible product referred to in defendant's answer to interrogatory numbered "1"?

Answer: Yes.

Interrogatory No. 4. Did defendant or its predecessor before or after cooking the whole wheat edible product referred to in defendant's answer to interrogatory numbered "1" add any ingredient whatsoever?

Answer: Yes.

Interrogatory No. 5. If the answer to interrogatory numbered "4" is "yes", state what such added ingredient or ingredients was or were added and at what stage of the preparation or making of such product such ingredient or ingredients was or were added.

Answer: Ingredients added—sugar, salt and water added at time of cooking. In war-time, by requirement of Food Administration, corn flour and rye were substituted for a portion of the wheat.

Interrogatory No. 6. State the form, state or condition of the whole wheat at the time of beginning the operation of baking the whole wheat product inquired about in interrogatory numbered "1".

Answer: In the form of unbaked, flavored shredded whole wheat biscuit.

Interrogatory No. 7. State whether or not defendant has in its possession or under its control a specimen or specimens of said whole wheat product, inquired about in interrogatory numbered "1", and, if so, state where the same may be examined by plaintiff's representatives or its counsel.

Answer: Have none of the flavored biscuit.

Interrogatory No. 8. State whether or not defendant or its predecessor, if any, advertised to the trade or public in the United States in letters, circulars, newspapers, trade or other publications, the whole wheat product inquired about in interrogatory numbered "1" and, if so, state the name or names and place or places of publication of any such publication or publications and the time or approximate time when any such advertisements were published.

Answer: Yes.

Christian Herald, April 23, 1913;

Home Life, April, 1913;

Cosmopolitan, July, 1913;

Good Housekeeping, April, 1913;

Collier's, July, 1913;

Smart Styles, November 1, 1913;

Collier's, May, 1914;

Popular Mechanics, August, 1913;

Munsey's, May, 1913.

Interrogatory No. 9. State whether or not defendant has in its possession or under its control a cut, picture, description, drawing or other representation or copy of any circular or other advertisement of the

whole wheat product, inquired about in interrogatory numbered "1" and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Yes—can be seen at office of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 10. If the answer to interrogatory numbered "9" is in the negative, state whether or not defendant knows whether any cut, picture, drawing or other representation of such whole wheat product or any advertisement thereof is extant, and where the same is located and who possesses the same.

Answer: Answered under No. "9".

Interrogatory No. 11. State whether or not defendant manufactured, sold and distributed in commerce in the United States whole wheat biscuit which was packaged in cartons or containers marked "Shredded Whole Wheat Biscuit"?

Answer: Yes, except that the cartons described the product as "Kellogg's" shredded whole wheat biscuit.

Interrogatory No. 12. If the answer to interrogatory numbered "11" is in the affirmative, state when defendant began the manufacture, sale and distribution in commerce in the United States of said whole wheat biscuit.

Answer: Early in 1922.

Interrogatory No. 13. If the answer to interrogatory numbered "11" is in the affirmative, state when defendant discontinued the manufacture, sale and distribution of such whole wheat biscuit.

Answer: October, 1922.

Interrogatory No. 14. If the answer to interrogatory numbered "11" is in the affirmative, state whether defendant has in its possession or under its control a specimen or specimens of said whole wheat biscuit and, if so, state where the same may be examined by plaintiff's representatives or counsel.

Answer: Yes, can be seen at office of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 15. If the answer to interrogatory numbered "11" is in the affirmative, state whether defendant has in its possession or under its control cartons for or a cut, picture, drawing or other representation, circular, description or advertisement of said whole wheat biscuit, and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Yes, can be seen at office of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 16. If the answer to interrogatory numbered "15" is in the negative, state whether or not defendant knows whether any cartons for or cut, picture, drawing or other representation of said whole wheat biscuit or circular, description or advertisement thereof are extant and if so whether it knows where the same are located and who possesses the same.

Answer: Answered under No. "15".

Interrogatory No. 17. Did defendant or its predecessor cook the whole wheat used in the whole wheat biscuit referred to in defendant's answers to interrogatories numbered "11" to "16", both inclusive?

Answer: Yes.

Interrogatory No. 18. Did defendant or its predecessor before or after cooking the whole wheat referred to in defendant's answers to interrogatories numbered "11" to "16", both inclusive, add any ingredient whatsoever thereto?

Answer: No—cooked only in water.

Interrogatory No. 19. If the answer to interrogatory numbered "18" is "yes", state what such added ingredient or ingredients was or were and at what stage of the preparation or making of such whole wheat such ingredient or ingredients was or were added.

Answer: See answer to No. "18".

Interrogatory No. 20. State whether or not defendant manufactured, sold and distributed in commerce in the United States whole wheat biscuit of the size, shape and design of the whole wheat biscuit contained in the carton or package which is presented herewith and marked "Plaintiff's Exhibit 1".

Answer: Defendant manufactured, sold and distributed in commerce in the United States shredded whole wheat biscuit of the size, shape and design of the biscuit contained in cartons like that identified as "Plaintiff's Exhibit 1", which exhibit appears to be one of defendant's cartons.

Interrogatory No. 21. State whether or not the whole wheat biscuit contained in said carton marked "Plaintiff's Exhibit 1" is the whole wheat biscuit of the manufacture and sale of defendant and whether the said carton or package containing the same is that of defendant and is the same as cartons in which defendant packaged and distributed in commerce in the United States said whole wheat biscuit.

Answer: See answer to Q. "20".

Interrogatory No. 22. If the answers to interrogatories numbered "20" and "21" are in the affirmative, state when defendant began the manufacture, sale and distribution in commerce in the United States of the said whole wheat biscuit.

Answer: In 1922, as to the biscuit referred to in answer to Q. "20", in cartons describing the product as Kellogg's shredded whole wheat biscuit. Kellogg's whole wheat biscuit cartons like "Plaintiff's Exhibit No. 1", first used by Kellogg Company, August, 1930. The said biscuit have been toasted top and bottom to a darker brown shade since 1927.

Interrogatory No. 23. If the answer to interrogatory numbered "20" is in the affirmative, state whether

or not defendant is now engaged in the manufacture, sale and distribution in commerce in the United States of the said whole wheat biscuit.

Answer: Yes, as explained in answer to No. "22".

Interrogatory No. 24. State when defendant began the use of the representation of two biscuit placed in a saucer as shown on the package or carton marked "Plaintiff's Exhibit 1", and whether it was employing the same upon its cartons containing said whole wheat biscuit at and prior to the filing of the bill of complaint in this cause.

Answer: Representation of two biscuits in a bowl as on carton marked "Plaintiff's Exhibit No. 1", first employed in August, 1930.

Interrogatory No. 25. State whether or not defendant has employed in its advertisements of or on its packages or cartons containing whole wheat biscuit the representation of the biscuit like the biscuit contained in "Plaintiff's Exhibit 1".

Answer: Yes.

Interrogatory No. 26. If the answer to interrogatory numbered "25" is in the affirmative, state when defendant began to employ the representation of a biscuit in its advertisements or upon its packages and whether it did so prior to the filing of the bill of complaint in this cause.

Answer: In 1912.

Interrogatory No. 27. State whether or not defendant has used or employed the name "Shredded" in its advertisements of its whole wheat biscuit like the whole wheat biscuit contained in "Plaintiff's Exhibit 1".

Answer: Defendant has employed the descriptive word "shredded" in its advertisements of the whole wheat biscuit referred to in the answer to Q. "20".

Interrogatory No. 28. If the answer to interrogatory numbered "27" is in the affirmative, state when

defendant began the use of the name "Shredded" in its advertisements of its said whole wheat biscuit and whether or not it did so prior to the filing of the bill of complaint in this cause.

Answer: Defendant first used the descriptive word "shredded" in its advertising of flavored shredded whole wheat biscuit in 1912 and of unflavored shredded whole wheat biscuit in 1922.

Interrogatory No. 29. State whether or not defendant has employed in connection with its advertisement of its said whole wheat biscuit inquired about in interrogatory numbered "20" a cut, representation or picture of a whole wheat biscuit in association with the name "Shredded" and, if so, state when defendant began to do so, whether or not it did so prior to the filing of the bill of complaint in this cause and produce true and correct copies of two or three such advertisements of defendant and state where they may be examined by plaintiff's representatives or counsel.

Answer: Defendant in 1922 began to use the descriptive word "shredded" in advertisements of its shredded whole wheat biscuit in association with a picture thereof. Specimens may be inspected at office of Kellogg Company in Battle Creek, Michigan, on notice.

Interrogatory No. 30. State whether or not defendant has employed the name "Shredded Wheat" in connection with its advertisements of its whole wheat biscuit inquired about in interrogatory numbered "20" and, if so, state whether it did so prior to the filing of the bill of complaint in this cause and produce copies or specimens of such advertisements.

Answer: Defendant at times in 1922 and at times during the period from 1927 to August, 1930, used in its advertisements the descriptive phrase "shredded whole wheat biscuit" coupled with the name Kellogg's, and defendant since August, 1930, in certain territories continuously used the phrase "Kellogg's shredded

whole wheat biscuit". It has not featured the descriptive phrase "shredded wheat" in connection with product marketed by it in cartons like "Plaintiff's Exhibit 1".

Interrogatory No. 31. State whether or not defendant's customers advertised to the public in the United States defendant's said whole wheat biscuit inquired about in interrogatory numbered "20" and, if so, whether or not any of defendant's customers for said whole wheat biscuit employed in their advertisements of defendant's said whole wheat product the name "Shredded Wheat" and, if so, whether such advertisements were published in the United States prior to the filing of the bill of complaint in this cause.

Answer: Tear sheets of dealer-advertising in files of Kellogg Company indicate that some grocers have referred to Kellogg's shredded whole wheat biscuit as "Kellogg's Shredded Wheat". Some of these dealer-advertisements are dated prior to the filing of the bill of complaint in this case. Defendant has no supervision or control over such dealer-advertisements.

Interrogatory No. 32. State whether or not defendant has in its possession or under its control any advertisements of its customers inquired about in interrogatory numbered "31" and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Defendant has in its possession dealer-advertisements which may be examined at defendant's office at Battle Creek, Michigan, on notice.

Interrogatory No. 33. State whether or not the whole wheat biscuit of the manufacture and sale of defendant in commerce in the United States, identified in interrogatories numbered "20" and "21" have been or are being sold to members of the public in the United States in restaurants, hotels and/or boarding houses

outside of and independent of the packages in which they are packaged when shipped by defendant.

Answer: For the restaurant and hotel trade defendant provides individual cartons containing two biscuit. Those cartons have the name Kellogg's prominently displayed thereon. Kellogg's distinctively sized and colored whole wheat biscuit referred to in the answers to interrogatories Nos. "20" and "22" are to the best of defendant's knowledge and belief sold to members of the public in the United States in restaurants, hotels, etc., packaged in the original distinctive Kellogg Company individual cartons in which they are packed when shipped. A scattering few restaurants may remove the biscuit from the carton before serving, but usually in presence of customer. The volume of defendant's business in individual sized cartons put up for restaurants and hotels, is from about two to three per cent. of its total measured in number of biscuits sold, and the percentage of restaurants which remove the biscuit from the carton when serving, as aforesaid, is estimated by defendant as not exceeding one per cent. of the total volume of defendant's individual carton business, making a proportion of approximately one to 5000 as applied to defendant's total volume of whole wheat biscuit business.

Interrogatory No. 34. If the answer to interrogatory numbered "33" is in the affirmative, state whether or not any identifying marks or indicia appear upon defendant's said whole wheat biscuit when sold to members of the public.

Answer: Defendant's biscuit are distinctively sized, shaped, colored and toasted top and bottom and were always clearly distinguishable both inside and outside of their cartons from plaintiff's product until plaintiff sought to neutralize or obliterate such size distinction by copying defendant's biscuit as to size

at a date long subsequent to defendant's adoption and use of its said distinctive small size of biscuit.

Interrogatory No. 35. Did defendant cook the whole wheat used in the whole wheat biscuit referred to in defendant's answer to interrogatory numbered "20"?

Answer: Defendant cooks the wheat used in all the shredded wheat biscuit made by it.

Interrogatory No. 36. Did defendant before or after cooking the whole wheat referred to in defendant's answer to interrogatory numbered "20" add any ingredient whatsoever thereto?

Answer: From 1922 to the present the wheat is cooked only in water. Disregarding such water no ingredients have been added.

Interrogatory No. 37. If the answer to interrogatory numbered "36" is "yes", state what such added ingredient or ingredients was or were and at what stage of the preparation or making of such whole wheat biscuit such ingredient or ingredients was or were added.

Answer: See answer to No. "36".

Interrogatory No. 38. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 2", is a specimen of cartons in which whole wheat biscuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 39. If the answer to interrogatory numbered "38" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 2" for packaging its whole wheat biscuit.

Answer: Early part of 1927.

Interrogatory No. 40. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 2" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if

not, state when the use by defendant of cartons like "Plaintiff's Exhibit 2" was discontinued.

Answer: No. Use discontinued about February, 1928.

Interrogatory No. 41. State whether or not the whole wheat biscuit of the manufacture and sale of defendant packaged in cartons like "Plaintiff's Exhibit No. 2" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1", and if not, describe the design of such biscuit or produce a specimen, cut or other representation of the same and state where the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit packaged in cartons like "Plaintiff's Exhibit 2" were the same in design and appearance as those packaged in cartons like "Plaintiff's Exhibit 1".

Interrogatory No. 42. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 3", is a specimen of cartons in which whole wheat biscuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 43. If the answer to interrogatory numbered "42" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 3" for packaging its whole wheat biscuit.

Answer: Defendant first began to use cartons identical with "Plaintiff's Exhibit No. 3" in the early part of 1928. Cartons of substantially the same style, design and size were used by the defendant for a short time during the year 1922.

Interrogatory No. 44. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 3" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if

not, state when the use by defendant of cartons like "Plaintiff's Exhibit 3" was discontinued.

Answer: Yes, with minor differences and in certain interstate markets only.

Interrogatory No. 45. State whether or not the whole wheat biscuit of the manufacture and sale in commerce in the United States of defendant packaged in cartons like "Plaintiff's Exhibit No. 3" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1" and if not, describe the design of such biscuit or produce a specimen or cut or other representation of the same and state where the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit made and packaged by defendant in cartons like "Plaintiff's Exhibit 3" were the same in design and appearance as those packaged in cartons like "Plaintiff's Exhibit 1".

Interrogatory No. 46. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 4", is a specimen of cartons in which whole wheat biscuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 47. If the answer to interrogatory numbered "46" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 4" for packaging its whole wheat biscuit.

Answer: Defendant first began to use cartons like "Plaintiff's Exhibit No. 4" August, 1930.

Interrogatory No. 48. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 4" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if not, state when the use by defendant of cartons like "Plaintiff's Exhibit 4" was discontinued.

Answer: Cartons like "Plaintiff's Exhibit No. 4" discontinued September 4, 1932.

Interrogatory No. 49. State whether or not the whole wheat biscuit of the manufacture and sale of defendant in cartons like "Plaintiff's Exhibit 4" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1" and, if not, describe the design of such biscuit or produce a specimen, cut or other representation of the same and state where the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit made and packaged by defendant in cartons like "Plaintiff's Exhibit 4" were the same in design and appearance as those made by defendant and packaged in cartons like "Plaintiff's Exhibit 1."

Interrogatory No. 50. State whether or not the carton which is presented herewith and marked "Plaintiff's Exhibit 5," is a specimen of cartons in which whole wheat biscuit were packaged and distributed in commerce in the United States by defendant.

Answer: Yes.

Interrogatory No. 51. If the answer to interrogatory number "50" is in the affirmative, state when defendant began to use cartons like "Plaintiff's Exhibit 5" for packaging its whole wheat biscuit.

Answer: Cartons like "Plaintiff's Exhibit No. 5" were first used by defendant September, 1932.

Interrogatory No. 52. State whether or not defendant is now using cartons like "Plaintiff's Exhibit 5" for packaging whole wheat biscuit of its manufacture and sale in commerce in the United States and, if not, state when the use of cartons like "Plaintiff's Exhibit 5" was discontinued.

Answer: Yes.

Interrogatory No. 53. State whether or not the whole wheat biscuit of the manufacture and sale of de-

defendant in cartons like "Plaintiff's Exhibit 5" are the same in design and appearance as the whole wheat biscuit contained in "Plaintiff's Exhibit 1" and, if not, describe the design of such biscuit or produce a specimen, cut or other representation of the same and state whether the same may be examined by plaintiff's representatives or counsel.

Answer: The shredded wheat biscuit made by defendant and sold in cartons like "Plaintiff's Exhibit 5" were the same in design and appearance as those sold in cartons like "Plaintiff's Exhibit 1."

Interrogatory No. 54. State when defendant began to embody on its cartons in which its whole wheat biscuit was packaged the following statement which appears upon "Plaintiff's Exhibit 1" and "Plaintiff's Exhibit 4":

"This certified analysis made by the Medical Arts Laboratory of Philadelphia, indicates the splendid food value of Kellogg's Shredded Whole Wheat Biscuit."

Answer: August, 1930.

Interrogatory No. 55. State when defendant began to use upon its cartons in which it packaged its whole wheat biscuit the following which appears upon "Plaintiff's Exhibit 4":

"Kellogg's
WHOLE
WHEAT
Biscuit

are made of delicately flavored whole wheat shreds. These shredded biscuit are a new convenient size. Two just fit the cereal bowl."

Answer: September 28, 1931.

Interrogatory No. 56. State whether or not defendant is now using upon cartons in which it packages its whole wheat biscuit the statement quoted in interrogatory numbered "55" and, if not, when did defendant discontinue the use of the same upon its cartons.

Answer: The statement quoted in Interrogatory No. "55" was discontinued September, 1932.

Interrogatory No. 57. State whether and, if so, when, the use of the statement quoted in interrogatory numbered "54" was discontinued by defendant upon cartons in which defendant packaged its whole wheat biscuit.

Answer: Discontinued September, 1932.

Interrogatory No. 58. State when defendant began to use upon its cartons in which it packaged its whole wheat biscuit the following statement which appears upon "Plaintiff's Exhibit 5":

"SHREDDED WHEAT IN ITS MOST DELICIOUS FORM."

Answer: September 14, 1932. Used on one end panel only.

Interrogatory No. 59. State when defendant began to use upon its cartons in which it packaged its whole wheat biscuit the following statement which appears upon "Plaintiff's Exhibit 5":

"A shredded wheat product."

Answer: September 14, 1932. Used on one end panel only.

Interrogatory No. 60. State whether or not defendant has discontinued the use upon its cartons in which it packages its whole wheat biscuit of either or both the statements quoted in interrogatories numbered "58" and "59".

Answer: No.

Interrogatory No. 61. Did defendant cook the whole wheat used in the whole wheat biscuit packaged in cartons like Plaintiff's Exhibits 2, 3, 4 and 5?

Answer: Yes.

Interrogatory No. 62. Did defendant before or after cooking the whole wheat used in the whole wheat biscuit referred to in defendant's answer to interroga-

tory numbered "61" add any ingredient whatsoever thereto?

Answer: No. Cooked only in water.

Interrogatory No. 63. If the answer to interrogatory numbered "62" is "Yes," state what such added ingredient or ingredients was or were used and at what stage of the preparation or making of such whole wheat biscuit such ingredient or ingredients was or were added.

Answer: See answer to No. "62."

Interrogatory No. 64. If the answer to interrogatory numbered "62" is "yes," state whether or not the addition of such ingredient or ingredients to the whole wheat used in the said whole wheat biscuit has or have been discontinued, and, if so, state the date when the use of the same was discontinued.

Answer: See answer to No. "62."

Interrogatory No. 65. State whether or not the whole wheat biscuit made prior and subsequent to the filing of the bill of complaint in this suit contained any ingredient or ingredients other than those existent in the natural wheat.

Answer: The whole wheat biscuits made prior to the year 1920 contained the added ingredients sugar and salt, and during war time, corn flour and rye were substituted for a portion of the wheat. Since 1920, the whole wheat biscuits have been made from whole wheat without flavoring or other added ingredient.

Interrogatory No. 66. State whether or not the manufacture and sale in the United States of a whole wheat product or biscuit by defendant or its predecessor was interrupted or discontinued at any time or times after such manufacture and sale was first begun.

Answer: Yes.

Interrogatory No. 67. If the answer to interrogatory numbered "66" is "Yes," state the time when each

of such interruptions or discontinuances began and when it ended.

Answer: Manufacture of flavored shredded whole wheat biscuits was discontinued in 1920, and unflavored biscuit was made, and manufacture discontinued, in 1922 as before stated. Manufacture and sale of the unflavored biscuit was resumed in 1927, as aforesaid, and has since continued.

Interrogatory No. 68. State whether or not defendant has packaged its whole wheat biscuit in cartons or packages other than those identified in the foregoing interrogatories by Exhibits Numbered 1 to 5, both inclusive, and, if so, produce a specimen of each other carton in which defendant packaged its said whole wheat biscuit and state where the same may be examined by plaintiff's representatives or counsel.

Answer: Defendant's shredded whole wheat biscuit have been packed in cartons or packages other than those identified in the foregoing interrogatories by "Exhibits Nos. 1 to 5" both inclusive. Specimens of each of these other cartons are in the files of the Kellogg Company at Battle Creek, Michigan, and may be examined by plaintiff's counsel, on notice.

Interrogatory No. 69. State whether or not the attached copy of letter dated January 14, 1922, and marked "Plaintiff's Exhibit 6" is a true and correct copy of a letter written by Kellogg Toasted Corn Flake Co. of Battle Creek, Michigan.

Answer: "Plaintiff's Exhibit No. 6" does not give an addressee on the alleged copy of letter dated January 14, 1922; therefore, defendant is unable to state whether or not "Exhibit No. 6" is a true and correct copy of a letter written by Kellogg Toasted Corn Flake Company, Battle Creek, Michigan.

Interrogatory No. 70. State whether or not other letters of the same tenor and purport as "Plaintiff's Exhibit 6" were written by said Kellogg Toasted Corn

Flake Co. of Battle Creek, Michigan, at or about the time that "Plaintiff's Exhibit 6" was written or within a period of six months from the date of said exhibit, to other parties or concerns in the United States and, if so, produce the same and state where they may be examined by plaintiff's representatives or counsel.

Answer: Defendant's files do not indicate that any letters of the same tenor and purport as "Exhibit No. 6" were written by Kellogg Toasted Corn Flake Company at the dates mentioned.

Interrogatory No. 71. State whether or not the said Kellogg Toasted Corn Flake Company of Battle Creek, Michigan, is the predecessor of defendant in the conduct of the business in which defendant is engaged.

Answer: Kellogg Toasted Corn Flake Company of Battle Creek, Michigan, was the predecessor of the defendant in the conduct of the business in which the defendant is engaged.

Interrogatory No. 72. State when defendant succeeded to the business theretofore conducted by Kellogg's Toasted Corn Flake Company of Battle Creek, Michigan.

Answer: In the year 1922.

Interrogatory No. 73. State whether or not said Kellogg Toasted Corn Flake Company has discontinued the manufacture of its wheat biscuit by or before January 14, 1922.

Answer: Yes.

Interrogatory No. 74. State whether or not defendant has in its possession or under its control a specimen or specimens of said wheat biscuit referred to in "Plaintiff's Exhibit 6" and, if so, state where the same may be examined by plaintiff's representatives or counsel.

Answer: No.

Interrogatory No. 75. State whether or not defendant has in its possession or under its control a cut,

picture, description, drawing or other representation or copy of any circular or other advertisement of the wheat biscuit referred to in "Plaintiff's Exhibit 6" and, if so, produce the same and state where plaintiff's representatives or counsel may examine the same.

Answer: Defendant has a cut or picture or advertisement of the flavored shredded whole wheat biscuit made by defendant's predecessor, and same can be seen at defendant's office in Battle Creek, Michigan, on notice.

Interrogatory No. 76. State whether or not defendant has in its possession or under its control a carton in which the wheat biscuit referred to in "Plaintiff's Exhibit 6" was packaged and, if so, produce the same and state where plaintiff's representatives or its counsel may examine the same.

Answer: Defendant has in its possession a carton in which its predecessor's flavored shredded whole wheat biscuit was packaged prior to June 14, 1922. Same may be examined at the offices of Kellogg Company, Battle Creek, Michigan, on notice.

Interrogatory No. 77. State whether or not the attached copy of letter dated January 19, 1922, addressed to Kellogg Toasted Corn Flake Company and marked "Plaintiff's Exhibit 7" is a true and correct copy of a letter received by said Kellogg Toasted Corn Flake Company and, if so, state the date on which the said letter was received.

Answer: Yes—received about January 21, 1922.

Interrogatory No. 78. State whether or not the attached letter dated April 8, 1927, and marked "Plaintiff's Exhibit 8," is a true and correct copy of a letter addressed to defendant, Kellogg Company and whether the said letter was received by defendant, and, if so, state the date on which it was received.

Answer: Yes—received about April 10, 1927.

Interrogatory No. 79. State whether or not the attached copy of letter dated April 22, 1927, and marked "Plaintiff's Exhibit 9," is a true and correct copy of a letter written on behalf of defendant to Messrs. Breed, Abbott & Morgan, 32 Liberty Street, New York, N. Y., and whether or not the letter was mailed on or about the date that it bears.

Answer: Yes.

Interrogatory No. 80. State whether or not the attached copy of letter dated May 10, 1927, and marked "Plaintiff's Exhibit 10," addressed to W. H. Crichton Clarke, is a true and correct copy and state the date on which it was received.

Answer: Yes—received about May 11, 1927.

Interrogatory No. 81. State whether or not the attached copy of letter dated May 16, 1927, and marked "Plaintiff's Exhibit 11," addressed to Messrs. Breed, Abbott & Morgan, is a true and correct copy of said letter and whether or not it was sent on or about the date which it bears.

Answer: Yes.

Interrogatory No. 82. Attached hereto and marked Plaintiff's Exhibits 12-a to 12-pp, both inclusive, are advertisements of defendant's whole wheat biscuit. In connection with each advertisement, the publication in which it was published and the place and date of publication appear.

State with reference to each of said exhibit advertisements (a) whether or not it is an advertisement of defendant of its whole wheat biscuit and (b) whether the said advertisements were published in the newspapers at the places and on or about the dates appearing in connection with the said exhibit advertisements.

Answer: (a) Yes, with the qualification that in some of the exhibits advertisements of others appear. For example, one of the advertisements on "Exhibit 12-pp" is obviously that of plaintiff and another adver-

tisement, "Exhibit 12-a," refers to Kellogg's corn flakes. (b) Yes.

Interrogatory No. 83. If the answer to interrogatory numbered "82" is in the affirmative, state whether or not any or all of the said advertisements referred to in defendant's answer to interrogatory numbered "82" were published by defendant or by its direction or authority in newspapers, periodicals, trade or other publications, other than those recited in connection with interrogatory "82," and, if so, state the name of each of such publication, the places of publication of each and the particular exhibit advertisements among Exhibits 12-a to 12-pp which were so published in the United States.

Answer: Yes. List of papers, town and state and advertisements attached.

Interrogatory No. 84. State the full period (time when begun and when ended) during which each of the said exhibit advertisements referred to in defendant's answers to interrogatories numbered "82" and "83" were published by defendant in newspapers, periodicals, trade or other publications published in the United States.

Answer: From week of February 29, 1932, to week of September 12, 1932, over much of the country. In 1931 appeared throughout the year; but not at the same time in all sections of the country. Of course, none of the advertisements appeared in every issue of every paper.

Interrogatory No. 85. If the answers to interrogatories numbered "82" and "83" are in the negative, in whole or in part, state whether or not any or all of the said exhibit advertisements, identified in defendant's answers to interrogatories numbered "82" and "83" were published in the United States by an agent, agents or representatives of defendant and, if so, identify the particular advertisement or advertisements which was

or were published by an agent, agents or representatives of defendant, the publications in which published, the place and date of publication.

Answer: See answers to interrogatories "82" and "83."

Interrogatory No. 86. If the answer to interrogatory numbered "85" is in the affirmative, state whether or not defendant paid, in whole or in part, for the publication in the United States of any or all of said advertisements and, if so, state whether defendant paid the full amount of the cost of each of said advertisements or what proportion of the cost of publication thereof defendant paid.

Answer: Memorandum on "Plaintiff's Exhibits 12-a to 12-pp." All exhibits in this group cover regular copy prepared and released by defendant's agency to newspapers as part of newspaper campaign on the shredded wheat biscuit made by defendant, also paid for by defendant through its agency, except as follows:

Exhibit 12-y. This is a news story released by defendant's agency, but for which no payment was made by the defendant.

Exhibit 12-ii. In this exhibit the only copy and space paid for by the defendant is the advertisement with the heading "Certified for Food Value". All other mention of Kellogg's whole wheat biscuit in dealer-advertising was inserted and paid for by the dealer in whose copy such mention was made, with no allowance from defendant.

Exhibit 12-jj. The only copy and space paid for by the defendant is the advertising with the heading "Just Try This New Whole Wheat Biscuit". All other mention of Kellogg's whole wheat biscuit in dealer-advertising was inserted and paid for by the dealer in whose copy such mention was made, with no allowance by defendant.

Exhibit 12-mm. All advertising appearing in this publication is free—that is, the space is free to the advertisers of the Tulsa Tribune, in this publication which is distributed free among the retail trade.

Exhibit 12-nn. The only copy and space paid for by the defendant is the advertisement with the heading "Seeing is believing". All other mention of Kellogg's whole wheat biscuit in dealer-advertising was inserted and paid for by the dealer in whose copy such mention was made, with no allowance by defendant.

Exhibit 12-pp. The advertisement "A New Whole Wheat Biscuit" is an advertisement paid for by the defendant. The advertisement to the right obviously is an advertisement of the plaintiff.

Exhibit 12-g. Same comments as on "Exhibit No. 12-mm".

Exhibit 12-s. Same comments as on "Exhibit No. 12-mm".

Exhibit 12-u. Corn flakes advertisements.

"Plaintiff's Exhibit 12-d" indicates the Courier-Post to be a Philadelphia newspaper. This is incorrect. Courier-Post is published in Camden, New Jersey.

Interrogatory No. 87. If the answer to interrogatory numbered "85" is in the affirmative, state whether or not defendant or its duly authorized representative or representatives furnished any of the material comprised in any or all of the said exhibit advertisements identified in defendant's answers to interrogatories numbered "82" and "83" and, if so, state what portion or portions of each of said exhibit advertisements was or were furnished by defendant and to whom furnished.

Answer: Answer to this question was covered by information given in answer to Interrogatory No. "86".

Interrogatory No. 88. If the answer to interrogatory numbered "85" is in the negative, in whole or in part, state whether or not defendant approved advertisements of its agents or representatives of whole wheat biscuit and identify the particular advertisement or advertisements which were so approved by defendant.

Answer: Advertisements paid for by the defendant were approved by defendant or defendant's agencies. Advertisements paid for by grocers were not submitted to, prepared or approved by defendant.

Interrogatory No. 89. Attached hereto and marked Plaintiff's Exhibits 13-a to 13-c, both inclusive, are advertising panels or displays of defendant's whole wheat biscuit.

State with reference to the said exhibit advertising panels or displays whether or not each of them is an advertising panel or display of defendant, whether each of them was distributed in the United States, the period (when begun and when ended) during which each of them was distributed in the United States and whether or not they relate to the whole wheat biscuit of the manufacture and sale of defendant.

Answer: Defendant is unable to identify "Exhibit 13-a". It looks like main panel of a Kellogg carton "Exhibits Nos. 13-b and 13-c were dealer display window pieces and related to Kellogg's shredded whole wheat biscuit. "Exhibit 13-b" distributed among the retail trade from January, 1929 to September, 1930. "Exhibit 13-c" from March, 1929 to September, 1930.

Interrogatory No. 90. State the approximate number of each advertising panel or display referred to in defendant's answer to interrogatory numbered "89" which was made and distributed by defendant or under its direction or authority, in the United States, the particular state or states in which each of

them was distributed, and to whom (as a class) they were distributed and the use that was intended to be made thereof.

Answer: 35,000 of "Exhibit 13-b" and 15,000 "Exhibit 13-c". These advertising pieces distributed among the retail grocer trade to promote sale of defendant's product.

Interrogatory No. 91. State whether or not the said exhibit advertising panels or displays referred to in defendant's answer to interrogatory numbered "89" were prepared and distributed for the purposes of advertising to the public the whole wheat biscuit of the manufacture and sale of defendant.

Answer: Yes.

Interrogatory No. 92. Attached hereto and marked Plaintiff's Exhibits 14-a to 14-ee, both inclusive, are advertisements. In connection with such advertisements the publications in which they were published and the dates of the publications containing the same appear. Among the said exhibit advertisements some were not published in newspapers or other publications. The latter are marked Plaintiff's Exhibits 14-z to 14-ee, both inclusive.

State with reference to the said exhibit advertisements, Nos. 14-a to 14-ee whether or not each of the said parties, corporations or concerns named therein are customers of defendant for its whole wheat biscuit, whether or not the references to shredded whole wheat biscuit appearing therein are to the whole wheat biscuit of defendant, whether or not the said advertisements (Plaintiff's Exhibits 14-a to 14-y) were published in the newspapers shown in connection with said exhibit advertisements on or about the dates appearing in connection with the said exhibit advertisements and whether or not the advertisements, Plaintiff's Exhibits 14-z to 14-ee, were put out and distributed by the concerns and at the places indicated thereon.

Answer: Kellogg Company has no control over these dealer-advertisements referred to in this question, and has nothing to do whatsoever with the wording of advertisements, price, etc. Several of these exhibits do not show the name of the dealer releasing the copy. The package electros were furnished to the dealers by Kellogg Company.

Interrogatory No. 93. State whether or not defendant, its agent, agents, or representatives, paid, in whole or in part, for the advertisements comprised in Plaintiff's Exhibits 14-a to 14-y, referred to in interrogatory numbered "92."

Answer: The defendant, its agents or representatives did not pay in whole or in part for any of the advertisements comprised in "Plaintiff's Exhibits 14-A to 14-Y" referred to in Interrogatory No. "92". The package electros were, however, supplied by the defendant.

Interrogatory No. 94. State whether or not defendant, its agent, agents or representatives paid, in whole or in part, for the printing or distribution of the advertisements comprised in Plaintiff's Exhibits 14-z to 14-ee.

Answer: The defendant, its agents or representatives did not pay in whole or in part for the printing and distribution of the advertisements comprised in "Plaintiff's Exhibits 14-z to 14-ee".

Interrogatory No. 95. State whether or not defendant, its agent, agents or representatives furnished any of the material comprised in any or all of the said exhibit advertisements, Plaintiff's Exhibits 14-a to 14-ee, and if so, state what portion or portions thereof was or were furnished by defendant, its agent, agents or representatives, for each of said exhibits and to whom furnished.

Answer: The defendant, its agents or representatives did not furnish any of the material compris-

ing advertisements in "Plaintiff's Exhibits 14-a to 14-ee" with the exception of the package electros, which were sent either direct to the dealer or through newspapers carrying advertising schedules.

Interrogatory No. 96. State whether or not the defendant, its agent, agents or representatives approved any or all the advertisements comprised in Plaintiff's Exhibits 14-a to 14-ee as to defendant's shredded whole wheat biscuits before the same were published and/or distributed and, if so, state which of said advertisements were so approved.

Answer: No. The Kellogg Company has no control over this type of dealer-advertising. The copy is run arbitrarily by the dealer and is not prepared by, submitted to, or approved by defendant.

[Note: Answers to Interrogatories signed by "Ross T. Adams, Secretary," and verified by him May 4, 1933.]

LIST REFERRED TO IN ANSWER TO INTERROGATORY No. 83.

WHOLE WHEAT BISCUIT.**DALLAS TERRITORY No. 2.**

Reporter	Abilene	Texas
News	Abilene	Texas
Globe	Amarillo	Texas
News	Amarillo	Texas
American	Austin	Texas
Statesman	Austin	Texas
Enterprise	Beaumont	Texas
Journal	Beaumont	Texas
Bulletin	Brownwood	Texas
Times-Herald	Dallas	Texas
Chronicle	Houston	Texas
Avalanche	Lubbock	Texas
Journal	Lubbock	Texas
News	Paris	Texas
Times	San Angelo	Texas
Standard	San Angelo	Texas
Light	San Antonio	Texas
Telegram	Temple	Texas
Courier Times	Tyler	Texas
Telegraph	Tyler	Texas
Record	Wichita Falls	Texas
Times	Wichita Falls	Texas
Democrat	Sherman	Texas
Herald	Brownsville	Texas
News Tribune	Waco	Texas
Times Herald	Waco	Texas

DENVER TERRITORY No. 2.

Gazette	Colorado Springs	Colorado
Telegraph	Colorado Springs	Colorado
Post Register	Idaho Falls	Idaho
Tribune	Pocatello	Idaho

WHOLE WHEAT 'BISCUIT.

DENVER TERRITORY No. 2.

Gazette	Billings	Montana
Gazette	Billings	Montana
Montana Standard	Butte	Montana
Post	Butte	Montana
Journal	Albuquerque	New Mexico
Journal	Albuquerque	New Mexico
Herald Post	El Paso	Texas
Tribune Herald	Casper	Wyoming
Tribune Leader	Cheyenne	Wyoming
Tribune	Salt Lake City	Utah
Telegram	Salt Lake City	Utah
Star Journal	Pueblo	Colorado
Gazette	Phoenix	Arizona
Republican	Phoenix	Arizona
Standard Examiner	Ogden	Utah

BOSTON TERRITORY No. 1.

Journal	Augusta	Maine
News	Bangor	Maine
LaMessenger (French)	Lewiston	Maine
Journal	Lewiston	Maine
Sun	Lewiston	Maine
Express	Portland	Maine
Press Herald	Portland	Maine
Sentinel	Waterville	Maine
Enterprise	Brockton	Massachusetts
Herald News	Fall River	Massachusetts
Times	New Bedford	Massachusetts
Transcript	North Adams	Massachusetts
Eagle	Pittsfield	Massachusetts
News	Salem	Massachusetts
Sentinel	Keene	New Hampshire
Leader	Manchester	New Hampshire
Union	Manchester	New Hampshire

WHOLE-WHEAT BISCUIT.**BOSTON TERRITORY No. 1.**

Telegraph	Nashua	New Hampshire
Times	Pawtucket	Rhode Island
Bulletin	Providence	Rhode Island
Free Press	Burlington	Vermont

CLEVELAND TERRITORY No. 1.

Beacon Journal	Akron	Ohio
Times Gazette	Ashland	Ohio
Messenger	Athens	Ohio
Herald	Circleville	Ohio
Dispatch	Columbus	Ohio
Citizen	Columbus	Ohio
News	Dayton	Ohio
Gazette	Delaware	Ohio
Courier	Findlay	Ohio
Advocate	Greenville	Ohio
Gazette	Lancaster	Ohio
News	Mansfield	Ohio
Journal	Mansfield	Ohio
Star	Marion	Ohio
Banner	Mt. Vernon	Ohio
Republican News	Mt. Vernon	Ohio
Call	Piqua	Ohio
Sun	Springfield	Ohio
News	Springfield	Ohio
Republican	Findlay	Ohio
Democrat	Kenton	Ohio
News	Lima	Ohio
Star	Lima	Ohio

WHOLE WHEAT BISCUIT.

CHICAGO TERRITORY No. 1.

Beacon News	Aurora	Illinois
Pantagraph	Bloomington	Illinois
News Gazette	Champaign	Illinois
Commercial News	Danville	Illinois
Courier News	Elgin	Illinois
Journal Standard	Freeport	Illinois
Register Mail	Galesburg	Illinois
Herald News	Joliet	Illinois
Star Courier	Kewanee	Illinois
Journal	Peoria	Illinois
Transcript	Peoria	Illinois
Register Republic	Rockford	Illinois
Star	Rockford	Illinois
Gazette	Sterling	Illinois
Post Crescent	Appleton	Wisconsin
News	Beloit	Wisconsin
Press Gazette	Green Bay	Wisconsin
Gazette	Janesville	Wisconsin
Northwestern	Oshkosh	Wisconsin
Capital Times	Madison	Wisconsin
Press	Sheboygan	Wisconsin
Record Herald	Wausau	Wisconsin
News	Kenosha	Wisconsin

MINNEAPOLIS TERRITORY No. 2.

Journal	Minneapolis	Minnesota
Dispatch	St. Paul	Minnesota
Pioneer Press	St. Paul	Minnesota
Forum	Fargo	North Dakota
Forum	Fargo	North Dakota
Herald	Duluth	Minnesota
News Tribune	Duluth	Minnesota
Free Press	Mankato	Minnesota
Tribune	Bismarck	North Dakota

WHOLE WHEAT BISCUIT.**MINNEAPOLIS TERRITORY No. 2.**

Herald	Grand Forks	North Dakota
Herald	Grand Forks	North Dakota
Tribune & Leader		
Press	La Crosse	Wisconsin
Telegram	Eau Claire	Wisconsin
Leader	Eau Claire	Wisconsin

NEW YORK TERRITORY No. 1.

Post	Bridgeport	Connecticut
Telegram	Bridgeport	Connecticut
News	Danbury	Connecticut
Times	Hartford	Connecticut
Record	Meriden	Connecticut
Register	New Haven	Connecticut
Hour	Norwalk	Connecticut
Advocate	Stamford	Connecticut
Republican	Waterbury	Connecticut
American	Waterbury	Connecticut

OKLAHOMA CITY TERRITORY No. 2.

News	Ada	Oklahoma
Times Democrat	Altus	Oklahoma
Enterprise	Bartlesville	Oklahoma
Eagle	Enid	Oklahoma
News	Enid	Oklahoma
Phoenix	Muskogee	Oklahoma
Times Democrat	Muskogee	Oklahoma
Oklahoma	Oklahoma City	Oklahoma
Times	Oklahoma City	Oklahoma
Democrat	Okmulgee	Oklahoma
Times	Okmulgee	Oklahoma
New	Stillwater	Oklahoma
Tribune	Tulsa	Oklahoma

WHOLE WHEAT BISCUIT.

PITTSBURGH TERRITORY No. 1.

Review	E. Liverpool	Ohio
Times	Marietta	Ohio
Tribune Chronicle	Warren	Ohio
Times	Erie	Pennsylvania
Tribune	Johnstown	Pennsylvania
News Telegraph	Sharon	Pennsylvania
Eagle	Butler	Pennsylvania
News	New Castle	Pennsylvania
Press	Pittsburgh	Pennsylvania
Herald	Uniontown	Pennsylvania
Genius	Uniontown	Pennsylvania
Tribune Republican	Meadville	Pennsylvania
Republican	Meadville	Pennsylvania
News	Wheeling	West Virginia

KANSAS CITY TERRITORY No. 2.

News	Hutchinson	Kansas
Herald	Hutchinson	Kansas
Beacon	Wichita	Kansas
Capital	Topeka	Kansas
Globe	Joplin	Missouri
News Herald	Joplin	Missouri
News Press	St. Joseph	Missouri
Gazette	St. Joseph	Missouri
Headlight	Pittsburg	Kansas
Sun	Pittsburg	Kansas

MEMPHIS TERRITORY No. 1.

Gazette	Little Rock	Arkansas
Times	Shreveport	Louisiana
News	Chattanooga	Tennessee
News Sentinel	Knoxville	Tennessee
Banner	Nashville	Tennessee

WHOLE WHEAT BISCUIT.**DES MOINES TERRITORY No. 2.**

Register	Des Moines	Iowa
Tribune	Des Moines	Iowa
Gazette & Republican	Cedar Rapids	Iowa
Democrat & Leader	Davenport	Iowa
Times	Davenport	Iowa
Courier	Waterloo	Iowa

DETROIT TERRITORY No. 1.

News	Alpena	Michigan
News	Ann Arbor	Michigan
Tribune	Cheboygan	Michigan
Journal	Lansing	Michigan
Press	Pontiac	Michigan
News	Sault Ste. Marie	Michigan
Record Eagle	Traverse City	Michigan
Press	Grand Rapids	Michigan
Sentinel	Holland	Michigan
Chronicle	Muskegon	Michigan
Times Herald	Port Huron	Michigan
Journal	Sturgis	Michigan
News Sentinel	Fort Wayne	Indiana
News Times	South Bend	Indiana

RICHMOND TERRITORY No. 1.

Ledger Dispatch	Norfolk	Virginia
News Leader	Richmond	Virginia
Times	Roanoke	Virginia
World News	Roanoke	Virginia
News	Greenville	Virginia
Piedmont	Greenville	Virginia

PITTSBURGH TERRITORY.

Herald-Star	Steubenville	Ohio
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WHOLE WHEAT BISCUIT.**SEATTLE TERRITORY No. 2.**

Statesman	Boise	Idaho
Statesman	Salem	Oregon
Herald	Bellingham	Washington
Spokesman Review	Spokane	Washington
Chronicle	Spokane	Washington
World	Wenatchee	Washington
Herald	Yakima	Washington
Republic	Yakima	Washington
Register-Guard	Eugene	Oregon
Mail Tribune	Medford	Oregon
Herald	Everett	Washington
Bulletin	Walla Walla	Washington

SAN FRANCISCO TERRITORY No. 2.

Bee Republican	Fresno	California
Sun & Press Telegram	Long Beach	California
Herald Express	Los Angeles	California
Times	Los Angeles	California
Star News	Pasadena	California
Sun	San Diego	California
Californian	Bakersfield	California
Signal	Huntington Park	California
Sun	San Bernardino	California
Telegram	San Bernardino	California
Register	Santa Ana	California

ST. LOUIS TERRITORY No. 1.

Journal	Springfield	Illinois
Globe Democrat	St. Louis	Missouri
Post Dispatch	St. Louis	Missouri
Press	Springfield	Missouri
Tribune	Terre Haute	Indiana

WHOLE WHEAT BISCUIT.**SYRACUSE TERRITORY No. 1.**

Advertiser	Elmora	New York
Star Gazette	Elmora	New York
Democrat & Chronicle	Rochester	New York
Times Union	Rochester	New York
Union Star	Schenectady	New York
Journal	Syracuse	New York
Post Standard	Syracuse	New York
News	Albany	New York
News	Batavia	New York

ATLANTA TERRITORY No. 1.

Times Union	Jacksonville	Florida
Herald	Miami	Florida
Tribune	Tampa	Florida
Journal	Atlanta	Florida

CINCINNATI TERRITORY No. 1.

Palladium	Richmond	Indiana
Item	Richmond	Indiana
Gazette	Chillicothe	Ohio
Telegraph	Bluefield	West Virginia
Sunset News	Bluefield	West Virginia
Gazette	Charleston	West Virginia
Advertiser	Huntington	West Virginia
Herald Dispatch	Huntington	West Virginia

OMAHA TERRITORY No. 2.

Journal	Sioux City	Iowa
Journal	Sioux City	Iowa
Journal	Lincoln	Nebraska
Journal	Lincoln	Nebraska
Star	Lincoln	Nebraska
World Herald	Omaha	Nebraska
World Herald	Omaha	Nebraska
Sun	Beatrice	Nebraska

WHOLE WHEAT BISCUIT.

PHILADELPHIA TERRITORY No. 1.

Every Evening	Wilmington	Delaware
Call	Allentown	Pennsylvania
Express	Easton	Pennsylvania
News	Harrisburg	Pennsylvania
Patriot	Harrisburg	Pennsylvania
New Era	Lancaster	Pennsylvania
Intelligencer Journal	Lancaster	Pennsylvania
Eagle	Reading	Pennsylvania
Daily	Sunbury	Pennsylvania
Sun	Williamsport	Pennsylvania
Gazette Bulletin	Williamsport	Pennsylvania
Gazette & Daily	York	Pennsylvania
Press	Bloomsburg	Pennsylvania
Sentinel	Carlisle	Pennsylvania
Public Opinion	Chambersburg	Pennsylvania
Times	Gettysburg	Pennsylvania
Sun	Hanover	Pennsylvania
Sentinel	Lewistown	Pennsylvania
Standard	Lykens	Pennsylvania
Review	Towanda	Pennsylvania
Herald	Hagerstown	Maryland
Mail	Hagerstown	Maryland
Gazette	Trenton	New Jersey
Times	Trenton	New Jersey
News	Bridgeton	New Jersey
Republican	Millville	New Jersey
Courier	Camden	New Jersey
Post	Camden	New Jersey

PLAINTIFF'S EXHIBIT NO. 1.**Specimen of Carton of Defendant.**

PLAINTIFF'S EXHIBIT NO. 2.**Specimen of Carton of Defendant.**

PLAINTIFF'S EXHIBIT NO. 3.**Specimen of Carton of Defendant.**

PLAINTIFF'S EXHIBIT NO. 4.**Specimen of Carton of Defendant.**

PLAINTIFF'S EXHIBIT NO. 5.**Specimen of Carton of Defendant.**

Plaintiff's Exhibit 6.

KELLOGG TOASTED CORN FLAKE CO.
Battle Creek, Mich.

January 14, 1922.

Dear Sir:

We have your letter of January 7, making inquiry of our Wheat Biscuit.

We have discontinued the manufacture of this product at the present time, and so are unable to supply you. We suggest, however, that you offer your customers some Shredded Krumbles, when they ask for Wheat Biscuit. This is a fine whole wheatfood and of the same nature as the Biscuit except that it is not in Biscuit form.

Yours very truly,

KELLOGG TOASTED CORN FLAKE CO.
J. F. Eckert
District Sales Manager

Plaintiff's Exhibit 7.

THE SHREDDED WHEAT COMPANY

January 19th, 1922.

Kellogg Toasted Corn Flake Company,
Battle Creek,
Michigan.

Gentlemen:

We have heard in trade circles that your Company is contemplating placing on the market a whole wheat biscuit similar to the biscuit produced and sold by us for many years.

We also notice on the carton of Kellogg's Corn Flakes, a list of Kellogg's Ready to Eat Products, containing the item "Shredded Whole Wheat Biscuit."

As you know, our Company claims that it possesses certain rights in the use of the name "Shredded Wheat", together with the peculiar form, size and style of biscuit, which is universally recognized as a product of this Company.

Our object in writing you is to frankly inquire whether the information obtained by us in the trade is or is not correct. You will, of course, realize that if it is your intention to market a whole wheat biscuit, we would like to have you understand thoroughly the legal claims which we make before you incur any expense in manufacturing or marketing a biscuit which so nearly resembles our product as to be calculated to deceive the public.

Yours very truly,

THE SHREDDED WHEAT COMPANY

A. J. Porter

President

Plaintiff's Exhibit 8.

April 8, 1927.

Kellogg Company,
Battle Creek,
Michigan.

Dear Sirs: }

Our attention has been called by our client, The Shredded Wheat Company, of Niagara Falls, N. Y., to the fact that you are now offering for sale a cereal food simulating in appearance the product sold by our client for upwards of thirty years past, and offered

to the trade in cartons and cases inscribed "Shredded Whole Wheat Biscuit."

Some four or five years ago, you offered for sale a produce of a wholly different character and appearance, labelled "Shredded Whole Wheat Biscuit." At that time, immediately on learning that you were applying to that product the name "Shredded Whole Wheat Biscuit", we protested to you in writing, and the sale of this product was discontinued so shortly thereafter that we had no occasion to resort to the processes of law to enforce our client's rights.

Your re-entry into the use of the name "Shredded Whole Wheat Biscuit" and the use of that name in connection with a product simulating in appearance the distinctive and widely known product of our client is unfair and unlawful, and we are instructed by our client to demand that you discontinue forthwith the sale of this product, and also to discontinue any and all use of the name "Shredded Whole Wheat Biscuit", or any name similar thereto, and that you furnish satisfactory assurance against any resumption of either of those practices. Should you fail to comply with this demand, our instructions are to proceed against you at once for an injunction against continuance of this unfair and unlawful practice and for an accounting of the damages sustained by our client.

Yours very truly,

BREED, ARBOTT & MORGAN

SF:EL

Plaintiff's Exhibit 9.**W. H. CRICHTON CLARKE**71 West 23rd Street
New York.

April 22nd, 1927.

Breed, Abbott & Morgan, Esqs.,
32 Liberty Street,
New York City.**REGISTERED MAIL**

Gentlemen:

In further answer to your letter of April 8, 1927 I refer you to my letters to the Shredded Wheat Company dated January 25, 1922 and to the Canadian Shredded Wheat Company, Ltd. dated August 5, 1925.

Those letters represent the position to which the Kellogg Company has always adhered and will continue to adhere. We have marketed Kellogg's Shredded Wheat and Kellogg's Shredded Wheat Biscuit for many years and we propose to continue to do so. We decline to recognize in the Shredded Wheat Company any valid monopoly in the same Shredded Wheat for biscuit or other shredded products. We have never in any way simulated any packages or exclusive features of the Shredded Wheat Company.

We never took any goods off the market on the request, demand or notice of the Shredded Wheat Company but have always asserted our rights and exercised them, and we propose to continue in the future to exercise our rights freely and independently and without any reference to or recognition of any exclusive rights in the Shredded Wheat Company in or to the words Shredded Wheat.

We have always made our position perfectly clear to your client and it is rather late now for your client

to affect any misunderstanding of our attitude and rights and intentions.

We have exercised our right to apply the descriptive term "Shredded Wheat" to our products for some years. We answered your demands of some years back with a firm assertion and employment of our right. Your clients never had any lawful grounds on which to complain of our activities and it is too
(w)

late not to attempt to revive a situation in which it was your client who backed down in the face of our asserted rights, intentions and activities, and who declined to take the prompt action which we so firmly challenged them at that time to take.

Yours very truly,

W. H. CRICHTON CLARKE

Plaintiff's Exhibit 10.

May 10, 1927.

W. H. Crichton Clarke, Esq.,
71 West 23rd Street,
New York City.

Dear Sir:

We acknowledge the receipt of your letter of April 22nd in which you assert the intention of your client to exercise what you term its rights, regardless of the rights of our client, The Shredded Wheat Company. We are replying to your letter solely because of the erroneous statement of facts it contains.

The Kellogg Company has not for a number of years, as you imply, marketed a whole wheat biscuit in the semblance of the product made by our client. Information has only recently come to us indicating that your client is now offering for sale, in a limited way, a biscuit which does resemble our client's product and is calculated to deceive the consumer.

A number of years ago, the Kellogg Company, or its predecessor, manufactured and sold for a time a product which it called "Kellogg's Toasted Wheat Biscuit." Thereafter the Kellogg Company commenced calling its product "Shredded Whole Wheat Biscuit." Upon this fact coming to the attention of The Shredded Wheat Company, it protested against the infringement of its rights in the use of this name.

You thereupon, in behalf of your client, wrote a letter asserting the invention of your client to proceed without regard to our client's rights, but your client advised the trade that it had discontinued the manufacture of this product, so that there was no occasion for The Shredded Wheat Company to take further action at that time.

Now, after a lapse of a considerable period of time, the Kellogg Company has changed the form of its product so as to closely imitate the biscuit of our client and is offering that product for sale under the name "Shredded Whole Wheat Biscuit."

Whatever may have been the intention of the Kellogg Company in the past, and there are indications of its desire to appropriate the good-will of The Shredded Wheat Company if this could be done with impunity, the tentative efforts made along these lines appear to have been abandoned following the protests made by our client notwithstanding the statement made in your letter that the rights of our client would be ignored.

If the Kellogg Company now persists in the unlawful practices to which we have called attention, we shall take such steps as may be proper to stop these practices.

Yours very truly,

BREED, ABBOTT & MORGAN

SF
WCB:P

Plaintiff's Exhibit 11.

W. H. CRICHTON CLARKE

71 West 23rd Street

New York.

May 16th, 1927.

Breed, Abbott & Morgan, Esqs.,
32 Liberty Street,
New York City.

Gentlemen:

I have your letter of May 10th in the matter of the Shredded Wheat Company against the Kellogg Company.

I deny emphatically that the Kellogg Company has ever discontinued the manufacture of Shredded Wheat or Shredded Wheat Biscuit on account of any rights claimed by the Shredded Wheat Company. It has marketed these products in the past and intends to continue to market the same in the future.

There is only one law in this country and that law works for us as well as against us. My client, then known as Toasted Corn Flake Company once tried to stop the Quaker Oats Company from marketing Toasted Corn Flakes a formerly patented product as Shredded Wheat Biscuit is. The courts held those words to be descriptive although they are less so than the term Shredded Wheat is. We are willing to prove to you at any time you choose that the law of this country will protect us as certainly as it protected the Quaker Oats Company.

We have marketed Shredded Wheat Biscuit for years and we propose to continue our operations.

We courteously advised you of our operations and rights some years ago. You should have acted then. It is too late now to complain, although even then you had no lawful monopoly in the name or product.

I can only repeat that our position has been set forth in letters written to you in the past as well during the present correspondence.

We deny that you have any exclusive rights in the words Shredded Wheat or in the biscuit itself and we are proceeding now as we have in the past to exercise our own independent rights in the matter.

Yours very truly,

W. H. CRICHTON CLARKE

Plaintiff's Exhibit No. 12-a

"LOS ANGELES EVENING HERALD,"

March 25, 1932.

ADVERTISEMENT

MANY FEATURES FOR NEW SHREDDED BISCUIT

**Kellogg's WHOLE WHEAT Bis-
cuit Set New Standard for
This Type of Cereal**

Local grocers are featuring a new shredded biscuit developed by the Kellogg Company of Battle Creek, Michigan, which is a decided improvement in many ways. The improved Kellogg biscuit is "pressure-packed" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is baked in.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You get 15 to the package instead of the usual dozen. And every biscuit is treated a rich golden brown on both top and bottom—not just one side. This makes them exceptionally crisp.

These new biscuits have been analyzed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced food with these new Kellogg biscuits.

Kellogg's whole wheat biscuits are tasty for breakfast, lunch, children's suppers. Extra good with fruits or sweetened with honey—in addition to the milk or cream.

You can identify these new biscuits by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-b.

**"LANCASTER DAILY INTELLIGENCER
JOURNAL,"**

March 19, 1932.

**MANY FEATURES
FOR NEW
SHREDDED BISCUIT**

Kellogg's **WHOLE WHEAT** Biscuit Set New Standard for This Type of Cereal

Local grocers are featuring a new shredded biscuit developed by the Kellogg Company of Battle Creek, Michigan, which is a decided improvement in many ways. The improved Kellogg biscuit is "pressure-cooked" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is baked in.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You get 15 to the package instead of the usual dozen. And every biscuit is toasted a rich golden brown on both top and bottom—not just one side. This makes them exceptionally crisp.

These new biscuits have been analysed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced food with these new Kellogg biscuits.

Kellogg's **WHOLE WHEAT** Biscuits are tasty for breakfast, lunch, children's suppers. Extra good with fruits or sweetened with honey—in addition to the milk or cream.

You can identify these new biscuits by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-c.

"THE HOUSTON CHRONICLE"

(Houston, Texas),

March 25, 1932.

MANY FEATURES FOR NEW SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Biscuit Set New Standard for This Type of Cereal

Local grocers are featuring a new shredded biscuit developed by the Kellogg Company of Battle Creek, Michigan, which is a decided improvement in many ways. The improved Kellogg biscuit is "pressure-cooked" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is baked in.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You get 15 to the package instead of the usual dozen. And every biscuit is toasted a rich golden brown on both top and bottom—not just one side. This makes them exceptionally crisp.

These new biscuits have been analyzed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced food with these new Kellogg biscuits.

Kellogg's WHOLE WHEAT Biscuits are tasty for breakfast, lunch, children's suppers. Extra good with fruits or sweetened with honey—in addition to the milk or cream.

You can identify these new biscuits by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-d.

"COURIER POST"
(Philadelphia, Pa.),
February, 1932.

NEW SHREDDED BISCUIT MORE ECONOMICAL

Just One of the Improvements
Developed for Kellogg's
WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new convenient size. Two are just right for a serving and fit the cereal bowl without crumbling. Also you get 15 to the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked"—a special process that bakes in the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream—fruits or honey added—for breakfast, lunch the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-e.
 "MIAMI, FLA., HERALD,"
 April 27, 1932.

NEW SHREDDED BISCUIT MORE ECONOMICAL

Just One of the Improvements
 Developed for Kellogg's
 WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new, convenient size. Two are just right for a serving and fit the cereal bowl without crumbling. Also you get 15 to the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked"—a special process that takes in the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream—fruits or honey added—for breakfast, lunch, the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

—Advertisement.

Plaintiff's Exhibit No. 12-1.

"LOS ANGELES EVENING HERALD"
(Los Angeles, California),
March 15, 1932.

NEW SHREDDED BISCUIT MORE • ECONOMICAL

Just One of the Improvements
Developed for Kellogg's
WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new, convenient size. Two are just right for a serving and fit the cereal bowl without crushing. Also you get 15 to the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked"—a special process that takes in the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream—fruits or honey added—for breakfast, lunch, the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made in Battle Creek.

"LOS ANGELES TIMES MERCHANDISER,"
April, 1932.

NEW SHREDDED BISCUIT MORE ECONOMICAL

Just One of the Improvements
Developed for Kellogg's
WHOLE WHEAT Biscuits

When the Kellogg Company were perfecting their new shredded biscuit, they decided that one of the improvements would be in the size of the biscuit. Kellogg's WHOLE WHEAT Biscuits are a new, convenient size. Two are just right for a serving and fit the cereal bowl without crumbling. Also you get 15 in the package, instead of the usual dozen.

The new Kellogg biscuits have a most delicious taste and crispness. They are "pressure-cooked"—a special process that bakes in the rich flavor. And every biscuit is double toasted—browned on both top and bottom.

Of even greater interest is the fact that Kellogg's WHOLE WHEAT Biscuits are so rich in food value that every package is certified by the Medical Arts Laboratory of Philadelphia. "Pressure-cooking" retains all the food value of the whole wheat, as well as making the biscuit easier to digest.

You'll find these new shredded biscuits a very welcome improvement. Delightful served with hot or cold milk or cream—fruits or honey added—for breakfast, lunch, the children's supper.

Grocers say that sales are steadily increasing. Identify this improved cereal by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-h.

LIMA, OHIO.

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NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

Extra Crispness Just One of
Many Improvements Devel-
oped for Kellogg's WHOLE
WHEAT Biscuit

LIMA, OHIO

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pressure-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certify every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-1

"NORFOLK LEDGER DISPATCH"

(Norfolk, Virginia),

March 29, 1932.

NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

**Extra Crispness Just One of
Many Improvements Devel-
oped for Kellogg's WHOLE
WHEAT Biscuit**

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pressure-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certifies every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-j.
"ST. LOUIS DAILY GLOBE-DEMOCRAT,"
March 30, 1932.

NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

Extra Crispness Just One of
Many Improvements Devel-
oped for Kellogg's WHOLE
WHEAT Biscuit

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pre-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certify every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-k.

BRIDGETON, PA., DAILY PAPER,
March 30, 1932.

NEW SHREDDED BISCUIT TOASTED ON BOTH SIDES

**Extra Crispness Just One of
Many Improvements Devel-
oped for Kellogg's WHOLE
WHEAT Biscuit**

In line with its policy of constant improvement, the Kellogg Company some time ago introduced a new shredded whole wheat biscuit which offers several outstanding improvements in this type of cereal.

The new Kellogg biscuit is "pressure-cooked" by a special process that retains the full food value of the whole wheat. At the same time it produces a delicious mellow flavor and makes the biscuit very easy to digest.

The biscuits are also much crisper and crunchier, for they are toasted on both top and bottom—not just one side. Incidentally they are also a new, convenient size to fit the cereal bowl without crumbling. And you get 15 to the package instead of the usual dozen.

As evidence of the high food value of the Kellogg biscuit, the Medical Arts Laboratory of Philadelphia made a careful analysis and certify every package.

Grocers say Kellogg's WHOLE WHEAT Biscuits are winning wide favor. Healthful and delightful for any meal. Especially good with hot milk. Identify this improved food product by the name Kellogg's and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-1.

"WAUSAU HERALD,"

(Wausau, Wisconsin),

April 1, 1932.

NEW SHREDDED BIS- CUIT EXTRA RICH IN VITAL FOOD ELEMENTS

Laboratory Certifies the Im-
proved Kellogg's WHOLE
WHEAT Biscuit

Before the new Kellogg's WHOLE WHEAT Biscuit was introduced, the Kellogg Company submitted it to the Medical Arts Laboratory of Philadelphia, which found it so rich in food value that every package could be certified.

This means that mothers can now know definitely that their children are getting a well-balanced food whenever they serve the new Kellogg biscuits and milk—rich in minerals, vitamins, proteins—nourishing and healthful.

And Kellogg's WHOLE WHEAT Biscuits offer many other features. The biscuits are "pressure-cooked" by a special process that bakes in the delicious flavor. At the same time, it retains all the valuable food elements of the whole wheat.

Kellogg's whole wheat Biscuits are much crisper and tastier because they are toasted a tempting brown on both top and bottom—not just one side. They are baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package.

Naturally this tasty new biscuit is welcome for breakfast, lunch, children's suppers—any meal, in fact. Ready to serve with hot or cold milk or cream. Sold by grocers in the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-m.

"THE EVENING BULLETIN"
(Providence, Rhode Island),
March 22, 1932.

NEW SHREDDED BIS- CUIT EXTRA RICH IN VITAL FOOD ELEMENTS

Laboratory Certifies the Im-
proved Kellogg's **WHOLE**
WHEAT Biscuit

Before the new Kellogg's **WHOLE WHEAT Biscuit** was introduced, the Kellogg Company submitted it to the Medical Arts Laboratory of Philadelphia, which found it so rich in food value that every package could be certified.

This means that mothers can now know definitely that their children are getting a well-balanced food whenever they serve the new Kellogg biscuits and milk—rich in minerals, vitamins, proteins—nourishing and healthful.

And Kellogg's **WHOLE WHEAT Biscuits** offer many other features. The biscuits are "pressure-cooked" by a special process that *bakes in* the delicious flavor. At the same time, it retains all the valuable food elements of the whole wheat.

Kellogg's **WHOLE WHEAT Biscuits** are much crisper and tastier because they are toasted a tempting brown on both top and bottom—not just one side. They are baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package.

Naturally this tasty new biscuit is welcome for breakfast, lunch, children's suppers—any meal, in fact. Ready to serve with hot or cold milk or cream. Sold by grocers in the red-and-green package. Made by Kellogg in Battle Creek.

—Advertisement

Plaintiff's Exhibit No. 12-n.

"DAILY TIMES"
(Erie, Pennsylvania),
March 25, 1932.

NEW SHREDDED BISCUIT MAKING BIG HIT

**Grocers Say Housewives Wel-
come Many Improvements
in Kellogg's WHOLE
WHEAT Biscuit**

Local grocers have pronounced the new Kellogg's WHOLE WHEAT Biscuit one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-a.

"THE GREENSBORO, N. C., RECORD"

(Greensboro, North Carolina),

March 25, 1932.

NEW SHREDDED BISCUIT MAKING BIG HIT

Grocers Say Housewives Welcome Many Improvements in Kellogg's **WHOLE WHEAT Biscuit**

Local grocers have pronounced the new Kellogg's **WHOLE WHEAT Biscuit** one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-p.

"DES MOINES TRIBUNE"

(Des Moines, Iowa),

April 1, 1932.

ADVERTISEMENT.

NEW SHREDDED BISCUIT MAKING BIG HIT

Grocers Say Housewives Welcome Many Improvements
in Kellogg's **WHOLE
WHEAT Biscuit**

Local grocers have pronounced the new Kellogg's **WHOLE WHEAT Biscuit** one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-g.

"THE DAILY NORTHWESTERN"

(Oshkosh, Wisconsin),

March 25, 1932.

NEW SHREDDED BISCUIT MAKING BIG HIT

**Grocers Say Housewives Wel-
come Many Improvements
in Kellogg's WHOLE
WHEAT Biscuit**

Local grocers have pronounced the new Kellogg's WHOLE WHEAT Biscuit one of the most up-to-date food products on the market. It offers many outstanding and popular features. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With either hot or cold milk, you achieve a well-balanced amount of vitamins, minerals, proteins and carbohydrates.

The Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-r.

"ST. PAUL DISPATCH"

(St. Paul, Minnesota),

March 22, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

Kellogg's WHOLE WHEAT Biscuits
Certified for Food
Value by Philadelphia
Laboratory

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom—not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size—two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast—and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

—Advertisement.

Plaintiff's Exhibit No. 12-a.

"THE RETAILER"
(Miami, Florida),
March, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

**Kellogg's WHOLE WHEAT Bis-
cuit Certified for Food
Value by Philadelphia
Laboratory**

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom — not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size — two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast — and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-t.

"EAU-CLAIRE TELEGRAM"

(Eau-Claire, Wisconsin),

April 4, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

**Kellogg's WHOLE WHEAT Bis-
cuit Certified for Food
Value by Philadelphia
Laboratory**

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom — not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size — two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast — and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-u.

"TULSA RETAILERS' TRIBUNE"

(Tulsa, Oklahoma),

March, 1932.

NEW SHREDDED BISCUITS CONTAIN IRON AND VITAMIN B

**Kellogg's WHOLE WHEAT Bis-
cuit Certified for Food
Value by Philadelphia
Laboratory**

Local grocers are featuring an improved shredded biscuit which contains both iron and Vitamin B. Kellogg's WHOLE WHEAT Biscuits are made by a special process known as "pressure-cooking," which retains the full food value of the whole wheat. In fact, the Medical Arts Laboratory of Philadelphia certifies each package. "Pressure-cooking" likewise gives the biscuits a finer flavor and makes it easier to digest.

The new Kellogg's biscuits are also toasted on both top and bottom — not just one side. Naturally, they are much crisper and tastier, as well as more appetizing in appearance.

The biscuits are likewise a more convenient, economical size — two just fit the cereal bowl. And there are 15 to the package instead of the usual dozen.

Kellogg's WHOLE WHEAT Biscuits are very popular for breakfast — and are finding increasing favor for lunch, children's suppers and late snacks. Especially enjoyable with fruits or sweetened with honey.

You can easily identify this improved cereal by the name, Kellogg's, and the familiar red-and-green package. Sold by grocers. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-v.

"DANVILLE, ILL., COMMERCIAL NEWS"

(Danville, Illinois),

April 22, 1932.

LOCAL GROCERS DISPLAYING NEW SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Biscuit One of Most Improved Foods Introduced in Recent Years

Kellogg's WHOLE WHEAT Biscuits offer many new and outstanding features which appeal to the housewife. For one thing, the biscuits are toasted a golden brown on both top and bottom—not just one side. That seems to double the crispness.

The new Kellogg biscuit is also baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 16 to the package instead of a dozen.

Mothers will especially be interested in the fact that every package is certified for food value by the Medical Arts Laboratory of Philadelphia. These new biscuits are considered a splendid food for both adults and children. With hot or cold milk or cream, they supply a healthful variety of vitamins, minerals, proteins and carbohydrates.

In baking these improved biscuits, the Kellogg Company uses a special process of "pressure-cooking" which retains all the food value of the whole wheat and makes it very easy to digest. At the same time it develops a tempting, delicious flavor.

These improved biscuits can be identified by the name, Kellogg's, and the familiar red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-w.

"HARTFORD TIMES"
(Hartford, Connecticut),
March, 1932.

ADVERTISEMENT

**NEW SHREDDED
BISCUIT EXTRA GOOD
WITH HOT MILK**

**Kellogg's WHOLE WHEAT
Biscuits Offer Many
Improvements**

Kellogg's WHOLE WHEAT Biscuits are especially delightful with hot milk. And many mothers are taking advantage of this in serving a healthful and most convenient breakfast treat these cold mornings.

Before the new Kellogg's WHOLE WHEAT Biscuit was introduced, the Kellogg Company submitted it to the Medical Arts Laboratory of Philadelphia, which found it so rich in food value that every package now carries a certificate.

This means that mothers can now know definitely that their children are getting a well-balanced food whenever they serve the new Kellogg biscuit—extra rich in minerals, vitamins, proteins.

Kellogg's WHOLE WHEAT Biscuits are "pressure-cooked" by a special process that makes in the delicious flavor. At the same time, it retains all the valuable food elements of the whole wheat.

The biscuits are much crisper and tastier because they are toasted a tempting brown on both top and bottom—not just one side. They are baked in a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package.

Identify this improved cereal by the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-x.
(LINCOLN, NEBRASKA),
April 21, 1932.

NEW SHREDDED BISCUIT CERTIFIED FOR FOOD VALUE

Philadelphia Laboratory Cer-
tifies the Improved Kellogg's
WHOLE WHEAT Biscuit

One of the greatest tributes to quality ever paid a food product is the fact that the Medical Arts Laboratory of Philadelphia now certifies every package of the new, improved Kellogg's **WHOLE WHEAT Biscuit** for food value.

These delicious biscuits are unusually rich in proteins, minerals, vitamins and other important food elements. One reason for this, is the fact that the biscuits are "pressure-cooked"—a process that retains all the food value of the whole wheat. "Pressure-cooking" also makes a rich, tempting flavor that every one praises.

The new Kellogg biscuit has many welcome features. It is toasted brown on both top and bottom—not just one side. It is made in a new, convenient size. Two biscuits just fit the cereal bowl; and you get 15 to the package—which means added economy.

Served with hot or cold milk or cream, fruit or honey added—Kellogg's **WHOLE WHEAT Biscuits** are delightful and wholesome for breakfast, lunch, children's suppers. Easy to digest and very nourishing.

Local grocers report that this improved shredded biscuit is meeting with hearty acceptance. It may be identified by the familiar red-and-green Kellogg's package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-y.

"BULLETIN OF MERCHANDISING AND SALES
PROMOTION,"

"BRIDGEPORT POST & TELEGRAM"

(Bridgeport, Connecticut),

March 21, 1932.

CERTIFIES THE NEW SHREDDED BISCUIT

**Philadelphia Laboratory Rates
Kellogg's Whole Wheat Very
Rich in Food Value**

One of the reasons for the popularity of the new Kellogg's Whole-Wheat Biscuits is the food value of this tasty ready-to-eat cereal. The improved Kellogg's biscuit is "pressure-cooked" by a special process that bakes in delicious flavor and retains all the food elements of the whole wheat. As a result, the Medical Arts Laboratory of Philadelphia, after careful analysis, now certifies every package for food value.

The new Kellogg biscuit also offers several other distinct improvements. The biscuits are a more convenient, economical size. Two just fit the cereal bowl—and you get 15 to the package instead of the usual dozen.

And every biscuit is toasted a golden, rich brown on both top and bottom—not just one side. This makes it crisper and tastier than ever before. Also, "pressure-cooking" and "double toasting" make Kellogg's Whole Wheat Biscuits easier to digest.

The new Kellogg's biscuit is delicious with hot or cold milk or cream; extra appetizing with the addition of fruits or honey. Local grocers are featuring this improved ready-to-eat cer-

Plaintiff's Exhibit No. 12-z
 "THE EVENING BULLETIN"
 (Providence, Rhode Island),
 April 1, 1932.

GROCCERS DISPLAYING NEW IMPROVED SHREDDED BISCUIT

Kellogg's WHOLE WHEAT Bis-
 cuit Making Hit with
 Housewives

One of the biggest improvements in cereals for many years is the new Kellogg's whole WHEAT Biscuit. Grocers say that it is gaining in popularity every day.

The new Kellogg biscuit is "pressure-cooked" by a special process that takes in the rich flavor and retains all the food value of the whole wheat. It makes the biscuit easier to digest, as well.

Kellogg's WHOLE WHEAT Biscuits are also toasted golden-brown on both top and bottom—not just one side. This makes them wonderfully crisp and crunchy. They are also a more convenient, economical size. Two biscuits just fit the cereal bowl—and you get 15 to the package, instead of the usual dozen.

Of special interest is the fact that the Kellogg biscuit is certified for food value by the Medical Arts Laboratory of Philadelphia, whose statement appears on every package.

Kellogg's WHOLE WHEAT Biscuits are proving a boon to mothers, because of their outstanding deliciousness and health value. A tasty treat for breakfast, lunch, children's suppers. Delightful with hot or cold milk or cream, fruits or honey. Sold by grocers in the red-and-green package. Made by Kellogg in Battle Creek.

—Advertisement

Plaintiff's Exhibit No. 12-aa.

"PRESS-TELEGRAM"

(Long Beach, California),

April 28, 1932.

NEW SHREDDED BISCUITS OFFER MANY ADVANTAGES

Local Grocers Say Customers
Delighted with Kellogg's
WHOLE WHEAT Biscuit

Grocers are now featuring a new shredded biscuit which offers many new features. Kellogg's WHOLE WHEAT Biscuits are "pressure-cooked" by a special process that retains the complete food value of the whole wheat. At the same time, delightful flavor is baked in.

These new biscuits have been analyzed by the Medical Arts Laboratory of Philadelphia and found to be so rich in food value that every package is certified. Any mother can now be certain her family is getting a well-balanced and tempting dish whenever she serves these new Kellogg biscuits with either hot or cold milk or cream.

Other improvements are a biscuit of more convenient, economical size. Two of these new biscuits just fit the cereal bowl. You also get 15 to the package instead of the usual dozen. And every biscuit is toasted a rich golden brown on both top and bottom — not just one side. This makes them exceptionally crisp and appetizing.

Kellogg's WHOLE WHEAT Biscuits are tasty for breakfast, lunch, children's suppers. Extra good with fruits or sweetened with honey.

You can identify these new biscuits by the name, Kellogg's, and the red-and-green package. Made by Kellogg in Battle Creek.

Plaintiff's Exhibit No. 12-bb.
 "MANILA DAILY BULLETIN"
 (Manila, Philippine Islands),
 March 11, 1932.



**A NEW
TASTE THRILL**

DOUBLE toasted for extra crispness. The biscuits are also a new, convenient size — two just fit your cereal bowl. Certified for food value. Made by Kellogg in Battle Creek.

(Toasted and Shredded)

Plaintiff's Exhibit No. 12-cc.
 "JOHNSTOWN TRIBUNE"
 (Johnstown, Pennsylvania),
 August 21, 1931.



**HERE'S A
NEW TREAT!**

TRIBUNE
 8/21/31

THE biscuits are toasted on both sides — extra crisp. New, convenient size — two fit the bowl. Just packed with tasty flavor! Certified for food value. Made by Kellogg in Battle Creek.

(Toasted and Shredded)

Plaintiff's Exhibit No. 12-dd.

"BANGOR DAILY NEWS"

(Bangor, Maine),

April 11, 1931.

**Just compare
these
improved
biscuit**

(shredded)



YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuit. They're packed with tempting flavor. Convenient new size to fit the cereal bowl. 15 biscuits to the package.

Toasted on both sides — extra crisp. And certified for food value. You get 10 important mineral salts and 5 vitamins. At your grocer's. Made by Kellogg in Battle Creek.



Plaintiff's Exhibit No. 12-ss.

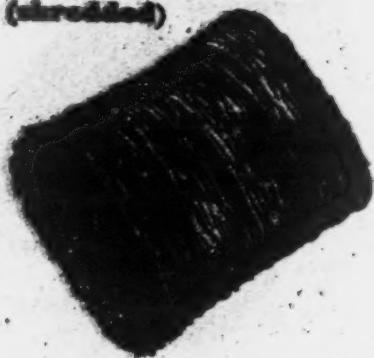
"FALL RIVER HERALD NEWS"

(Fall River, Massachusetts),

April 3, 1931.

**Just compare
these
improved
biscuit**

(shredded)



YOU get a lot of new features
in Kellogg's **WHOLE WHEAT
Biscuit**. They're packed with
tempting flavor. Convenient
new size to fit the cereal bowl.
15 biscuits to the package.

Toasted on both sides —
— extra crisp. And certified
for food value. You get 10 im-
portant mineral salts and five
vitamins. At your grocer's.
Made by Kellogg in Battle
Creek.



Plaintiff's Exhibit No. 12-ff.

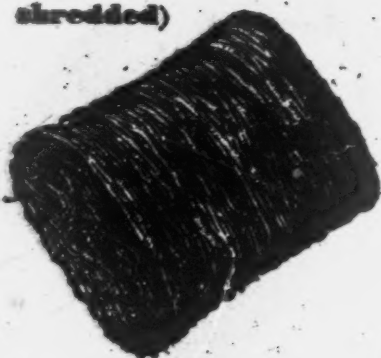
"MARION STAR"

(Marion, Ohio),

April 3, 1931.

**Just compare
these
improved
biscuit**

(shredded)



YOU get a lot of new features
in Kellogg's WHOLE WHEAT
Biscuit. They're packed with
tempting flavor. Convenient
new size to fit the cereal bowl.
15 biscuits to the package.

Toasted on both sides —
— extra crisp. And certified
for food value. You get 10 im-
portant mineral salts and five
vitamins. At your grocer's.
Made by Kellogg in Battle
Creek.



Plaintiff's Exhibit No. 12-88.

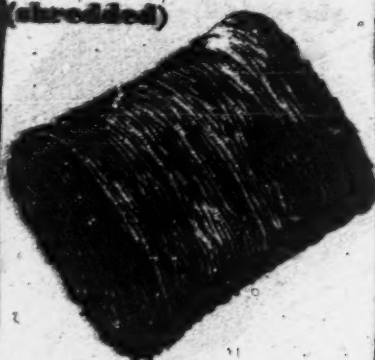
"ST. PAUL DISPATCH"

(St. Paul, Minnesota),

April 9, 1931.

**Just compare
these
improved
biscuit**

(shredded)



YOU get a lot of new features
in Kellogg's **WHOLE WHEAT**
Biscuit. They're packed with
tempting flavor. Convenient
new size to fit the cereal bowl.
15 biscuits to the package.

Toasted on both sides —
— extra crisp. And certified
for food value. You get 10 im-
portant mineral salts and five
vitamins. At your grocer's.
Made by Kellogg in Battle
Creek.



Plaintiff's Exhibit No. 12-hh.

"CIRCLEVILLE HERALD"

(Circleville, Ohio),

March 27, 1931.

Certified for Food Value

Never before have
mothers known a cereal like this

THINK of the advantage! A crisp, delicious, ready-to-eat cereal — very economical — and certified for highest food value by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to real health.

Tasty, tempting biscuits! Double toasted — therefore crunchy-crisp on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food value.

Serve for breakfast, for lunch, for the nursery supper — an afternoon nourishment for the children. 30 calories of energy per biscuit. Two biscuits just fit the bowl.

Think of the healthfulness! Consider the benefits to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Chlorine for digestion. Proteins for tissue-building. Vitamins for health and resistance to disease. A certified cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the certified analysis on the red-and-green package. Made by Kellogg in Battle Creek.



(Circleville, Ohio),
March 27, 1931.

Certified for Food Value

Never before have
mothers known a cereal like this

Think of the advantage! A crisp, delicious, ready-to-eat cereal — very economical — and certified for balanced food value by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to real health.

Tasty, tempting biscuit! Double toasted — therefore crunchy-crisp on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food value.

Serve for breakfast, for lunch, for the nursery supper — or afternoon nourishment for the children. 20 calories of energy per biscuit. Two biscuits just fill the bowl.

Think of the healthfulness! Consider the benefits to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Chlorine for digestion. Protein for tissue-building. Vitamins for health and resistance to disease. A certified cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the certified analysis on the red-and-green package. Made by Kellogg in Battle Creek.



Each package of Kellogg's WHOLE WHEAT Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 10 important mineral salts. A bowl of milk and two biscuits will supply about half your daily requirement of calcium... half the phosphorus you need... nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, G. (IMPURITY 247). Copper is present, which makes the iron salts all the more assimilable. Recent scientific research indicates that copper is necessary to prevent anemia.

Plaintiff's Exhibit No. 12-II.

"LANCASTER, OHIO, DAILY GAZETTE"

(Lancaster, Ohio),

April 3, 1931.

Certified for Food Value

Never before have
mothers known a cereal like this

Think of the advantage! A crisp, delicious, ready-to-eat cereal — very economical — and certified for balanced food value by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to good health.

Tasty, satisfying breakfast! Double benefit — three-fold nourishment on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food value.

Serve for breakfast, for lunch, for the weary supper — an efficient nourishment for the children. 50 calories of energy per biscuit. Two biscuits just fit the bill.

Think of the healthfulness! Consider the benefit to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Chlorine for digestion. Protein for strength-building. Vitamins for health and resistance to disease. A certified cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the certified analysis on the red-and-green package. Made by Kellogg in Battle Creek.



Lancaster, Ohio, Lancaster, Ohio
(Lancaster, Ohio),
April 3, 1931:

Certified for Food Value

Never before have
mothers known a cereal like this

Think of the advantage! A crisp, delicious, ready-to-eat cereal — very convenient — and certified for highest food value by a prominent analytical laboratory, whose seal appears on every package.

By eating Kellogg's WHOLE WHEAT Biscuit you are sure of getting vital food elements that are so often lacking in the average meal — especially breakfast. Elements that are necessary to good health.

Tasty, satisfying biscuits! Double topped — a crisp crusty top on both sides. Made of whole wheat by a special Kellogg process that retains practically all the wonderful food value.

Serve for breakfast, for lunch, for the nursery supper — an afternoon nourishment for the children. 30 calories of energy per biscuit. Two biscuits just fit the bill!

Think of the healthfulness! Consider the benefits to children and grown-ups alike! Calcium and phosphorus for better teeth and bones. Iron and copper for rich blood. Chlorine for digestion. Protein for tissue-building. Vitamins for health and resistance to disease. A certified cereal!

Ask your grocer for Kellogg's WHOLE WHEAT Biscuit. Look for the certified analysis on the red-and-green package. Made by Kellogg in Battle Creek.



Each package of Kellogg's WHOLE WHEAT Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 10 important mineral salts. A half of salt and two biscuits will supply about half your daily requirement of sodium. . . . help the phosphate you need . . . nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, K. **IMPORTANT:** Copper is present, which makes the iron salts all the more assimilable. Recent scientific research indicates that copper is necessary to prevent anemia.

Here's the New Kellogg Whole Wheat Bis

HELP YOURSELF TO HEALTH IN THIS NEW WAY

Nearly every person today knows that a child is receiving Vitamin A and Vitamin B from his mother's milk and from his mother's diet. But, when one has a child, it is important to know that the child is getting his Vitamin A and Vitamin B from his mother's milk and from his mother's diet. This is because Vitamin A and Vitamin B are essential for the growth and development of the child. If a child does not get enough of these vitamins, he may become weak and sickly. Therefore, it is important to make sure that your child is getting his Vitamin A and Vitamin B from his mother's milk and from his mother's diet.

Friday and Saturday SPECIALS

Potatoes	Home Crown	Per Bu.	69c
Pears, Bartlett,	Box	Per	\$2.29
Watermelon,	Disc	Per Bu.	49c
Hills Bros. Coffee	Per Lb.	39c	
Soap, P. & G. and Bob White	Per 10	29c	

Fresh Wax Beans, Cauliflower, Head Lettuce, Egg Plant, Radishes, Beets, Tomatoes, Celery.



The Kellogg Story Book of Games FREE with a purchase of Two packages of Kellogg's Whole Wheat Biscuit or your choice of any one of Kellogg's products with one package of the new Whole Wheat Biscuit. 25c

Red Front Grocery PHONE 43

FAIR WEEK SPECIALS —AT— SAFFERT'S

Our Excellent Line of GOLD MEATS Will Help You Make a Quick and Tasty Fair Dinner.

BOASTS—	Per Lb.	
BEEF	15c	
VEAL	15c	
PORK	15c	
LOAF	15c	
PICNIO HAMS,	16c	
CHERRY, lb.		
BACON	19 1/2c	
SQUABES, lb.	19 1/2c	

The Kellogg Story Book of Games FREE with a purchase of Two packages of Kellogg's Whole Wheat Biscuit or your choice of any one of Kellogg's products with one package of the new Whole Wheat Biscuit. 25c

Always FRESH—
Butter-Nut
The Coffee Delicious
BUTTERNUT COFFEE, per lb. 25c
We Reclaim Your Coffee Cans.

WELCOME VISITORS
SAFFERT'S
PROVISION MARKET
"WHEN YOU BUY QUALITY"

Phone 144, 217-19 N. Minnesota St. New Ulm, Minn.

Just try this new WHOLE WHEAT BISCUIT (SHREDDED)

Different in size...different in crispness...different in flavor!

YOU get a lot of new features in Kellogg's WHOLE WHEAT Biscuits. They're made of delicious wheat already — just packed with flavor. Every biscuit is topped on the bottom as well as the top — crispier than ever.

Kellogg's WHOLE WHEAT Biscuits are a new, convenient size too — just the right size to fit your cereal bowl. Fifteen biscuits in the package.

And here's the biggest point of all. Every package of Kellogg's WHOLE WHEAT Biscuits is certified for food value. For those tempting

biscuits are made by a special process that guards practically all the elements of the whole wheat.

Each time you eat Kellogg's WHOLE WHEAT Biscuits, you get calcium and phosphorus for teeth and bones. Iron and copper for red blood. Vitamin for health... as well as many other vital food elements.

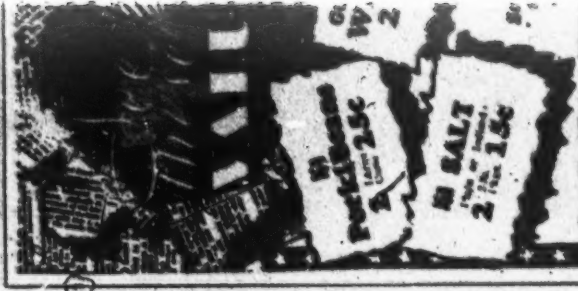
Served with milk or cream, two of these tempting biscuits supply more than a third of the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE WHEAT Biscuits from your grocer. Made by Kellogg in Battle Creek.

Kellogg's WHOLE WHEAT BISCUIT



* Each package of Kellogg's whole wheat biscuits is certified for food value. Look for the analysis on the side of the package. Each biscuit contains 10 important mineral elements. A half of milk and two biscuits will supply about half your daily requirements of calcium... half the phosphorus you need... nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, K. IMPORTANT: Cereals in general, which include the time with all the same ingredients. Recent scientific research indicates that cereals are necessary to present adults.



Beefsteak 2 lbs. 2.5c
Beefsteak 1 lb. 1.25c
Beefsteak 1/2 lb. 60c
Beefsteak 1/4 lb. 30c
Beefsteak 1/8 lb. 15c
Beefsteak 1/16 lb. 7c
Beefsteak 1/32 lb. 3c
Beefsteak 1/64 lb. 1c
Beefsteak 1/128 lb. 1/2c
Beefsteak 1/256 lb. 1/4c
Beefsteak 1/512 lb. 1/8c
Beefsteak 1/1024 lb. 1/16c
Beefsteak 1/2048 lb. 1/32c
Beefsteak 1/4096 lb. 1/64c
Beefsteak 1/8192 lb. 1/128c
Beefsteak 1/16384 lb. 1/256c
Beefsteak 1/32768 lb. 1/512c
Beefsteak 1/65536 lb. 1/1024c
Beefsteak 1/131072 lb. 1/2048c
Beefsteak 1/262144 lb. 1/4096c
Beefsteak 1/524288 lb. 1/8192c
Beefsteak 1/1048576 lb. 1/16384c
Beefsteak 1/2097152 lb. 1/32768c
Beefsteak 1/4194304 lb. 1/65536c
Beefsteak 1/8388608 lb. 1/131072c
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Beefsteak 1/33554432 lb. 1/524288c
Beefsteak 1/67108864 lb. 1/1048576c
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Beefsteak 1/268435456 lb. 1/4194304c
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Beefsteak

YOURSELF
ALTH IN
S NEW WAY

very young child is, raising Vitamin C levels to increase his resistance to disease and, particularly to colds. Vitamin C also helps his growth; Vitamin C is not for his nervous system, and Vitamin B is for his developing brain and his straight bones and his teeth.

And, in addition, it furnishes energy for red blood and myelin, so that he can be necessary to keep growing. Vitamin C is also necessary to keep his capillaries tight, so that he can keep his phosphorus, which also strengthens his bones.

That's very prominently laid out the functions of some structure.

And Vitamin C is the most important to his growth, this is a really beautiful and, at the same time, his delightful diet. Two of the most beautiful diets I've found, the most beautiful diets I've found, are the diets of the two.

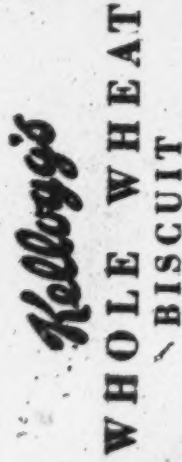
They are citrus and bananas. And they are taken on both sides.

Different in size...different in crispness...different in flavor!

YOU got a lot of new features in Kellogg's **SHOLE WHEAT** Blends. They're made of delicious wheat blends — just packed with flavor. Every blend is toasted on the bottom as well as the top — crisper than ever.

Kellogg's WHOLE WHEAT Flakes are a new, convenient size too — just the right size to fit your cereal bowl. Fifteen flakes to the package.

And here's the biggest point of all. Every package of Kellogg's WHOLE WHEAT Flakes is certified for food value. For those tempted



Each publisher of *Edging's* wants your book to work for you. Each for the publisher on the other hand. Each business needs 10 important things: a kind of cash and two months' supply about half year daily requirements of salaries... half the place where you work... nearly a fourth the time, as well as many other fixed elements, including the *Financials* A, B, C, D, E, **IMPORTANT**. Capital to present, which makes the two sides of the more satisfactorily. Based on scientific research indicates that capital is necessary to present money.

**this new
AT-BISCUIT
(DEED)**

Each time you eat Kellogg's WHOLE WHEAT Flakes, you get calcium and phosphorus for teeth and bones, iron and copper for red blood. Vitamins for health... as well as many other vital food elements.

Served with milk or cream, two of these tempting biscuits supply more than a third of the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE
WHEAT Flakes from your grocer. Made by
Kellogg in Battle Creek.

UNITED STATES Deliver
Specials for Friday and Saturday

Mason Jar Covers	- Per	22c
SOAP, Bob White	10 Bars for	29c
CORN, Hillcrest	No. 2 - for	33c
YEAST FOAM	-	8c
Butter-Nut Coffee,	per	45c
Pineapple,	Happy Isle No. 21 Can	17c
Tomatoes,	No. 3 Can for	26c
PEAS,	SPRINGTIME No. 21 Can for	33c

A surprise for the children—One Kellogg's Story Book of Clauses FREE, with two packages of Kellogg's Whole Wheat Raisin or one package of Whole Wheat Raisin and your choice of Kellogg's Corn Flakes, Pop-Tops, Flakes, Krumbs, Rice Krispies, or All Bran. Two packages for

Our Most Popular Coffee -
Butter-Nut
the Coffee



Delicious
WE REDEM YOUR COUPONS

PURITY GROCERY

H. M. DIECKENHOFER, Prop.

one year	-	Per Box	-	69c
Letts, Per \$2.29				
1, Dice Belle	-	Per Box	-	49c
office - Per 39c				
d -	-	10 for	-	29c

The Kellogg Story Book of Games FREE with a purchase of Two packages of Kellogg's Whole Wheat Flismit or your choice of any one of Kellogg's products with one package of the new Whole Wheat Flismit. Two packages for \$2.50

WEEK SPECIALS
AT **WERT'S**

**COLD MEATS WILL Help You
and Your Folks Discover**

PORK SHOULDER, per lb.	15 1/2c
Delicious Fresh Meat	
LOAF	
GERMAN CLUB	25c
CHEESE, lb.	
FRUITS AND VEGETABLES	



E VISITORS

'ERT'S

ON MARKET

"BUY QUALITY"

1000 Broadway, N.Y. 10018

SCHNEIDER'S GROCERY

Pie in Hams 16¢ **LARD** Per Lb. **10¢**
Per Lb.

CORN Buy a dozen or case now
PEAS They will be higher.
TOMATOES Per Doz. **\$1.20**

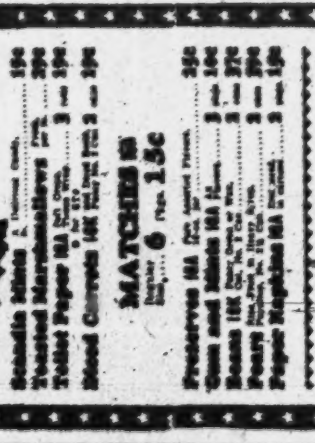
SOAP 10 Bars Bob White	32c	CONCORD 30c GRAPES Market
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A surprise for the children! One Kellogg's Story Book of times FRENCH with two packages of Kellogg's Wheat Wheat Bran or one package of Wheat Bran Bran and your choice of Kellogg's Corn Flakes, Pep. Bran Flakes, Crunches, Rice Krispies, or All Bran. Two packages for 25¢

Butter-Nut
The Coffee Delicious

BUTTERNUT COFFEE, per lb. \$1.00
We Roast Butter-Nut Coffee Constantly.

Schneider's Grocery
Phone 1100 We Deliver



HAVE YOU TRIED THEM
 THIS WAY!

Baked Bean Casserole

Cook a small onion and 1 green pepper sliced fine in 1/2 cup oil. Add 1 can T.M. lentils and 1 can tomatoes. Arrange in alternate layers with 1 egg, grated cheese in the ground meat casserole with 1/2 cup milk. Bake in moderate oven for 1 1/2 hours.

Baked Bean Casserole

Meatballs
Cover thin slices of ham with LGA, Pork and Beans

LIVER SAUSAGE, per lb. 15c
BLOOD TONGUE, per lb. 20c

**LIA FRUITS
VIGIARELLI**

CANTALOUPE, 1/2 INCH, EACH	10c
ORANGES, 280 Sunbist, #	28c
CELERY, per bunch	15c
HEAD LETTUCE, each	15c

INDEPENDENT GROCERS' ALLIANCE

The Kellogg Story Book of Games FREE, with a purchase of Two packages of Kellogg's Whole Wheat Linenit or your choice of any one of Kellogg's cereals, with our change of the new Whole Wheat Linenit.

Plaintiff's Exhibit No. 12-jj.
 "BROWN COUNTY JOURNAL"
 (New Ulm, Minnesota),
 August 28, 1931.

Plaintiff's Exhibit No. 12-kk.
 "THE PITTSBURGH PRESS"
 (Pittsburgh, Pennsylvania),
 April 1, 1932.

Just try this new WHOLE WHEAT BISCUIT (SHREDDED)

*Different in size . . . different in
 crispness . . . different in flavor!*

YOU get a lot of new features in Kellogg's
 WHOLE WHEAT Biscuit. They're made of deli-
 cious wheat shreds—just packed with flavor.

Every biscuit is toasted on the bottom as
 well as the top—crisper than ever.

Kellogg's WHOLE WHEAT Biscuit are a new,
 convenient size too—just the right size to fit
 your cereal bowl. Fifteen biscuits to the package.

And here's the biggest point of all. Every
 package of Kellogg's WHOLE WHEAT Biscuit
 is certified for food value. For these tempting
 biscuits are made by a special process that
 guards practically all the elements of the rich
 whole wheat.

Each time you eat Kellogg's WHOLE WHEAT
 Biscuit, you get calcium and phosphorus for
 teeth and bones. Iron and copper for red blood.
 Vitamins for health . . . as well as many other
 vital food elements.

Served with milk or cream, two of these
 tempting biscuits supply more than a third of
 the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE WHEAT
 Biscuit from your grocer. Made by Kellogg in
 Battle Creek.



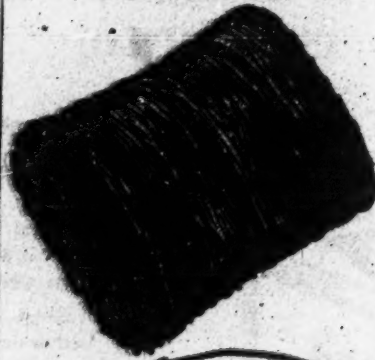
* Each package of Kellogg's WHOLE WHEAT Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 18 important mineral salts. A bowl of milk and two biscuits will supply about half your daily requirement of calcium . . . half the phosphorus you need . . . nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, G. IMPORTANT: Creamer is available, which . . .

Kellogg's
 WHOLE WHEAT

Plaintiff's Exhibit No. 12-11.

,"THE JANESVILLE DAILY GAZETTE"
(Janesville, Wisconsin),
May 19, 1931.

**Deliciously
Improved
by Kellogg**



HERE'S a new shredded biscuit you'll want to try. Wonderfully improved in taste and size. Made of delicately flavored whole-wheat shreds.

The biscuits are a new convenient size. Two just fit the cereal bowl. Double toasted. Crunchy-crisp top and bottom. 15 biscuits to the red-and-green package.

Ask your grocer for Kellogg's
WHOLE WHEAT Biscuit. Made
by Kellogg in Battle Creek.



Plaintiff's Exhibit No. 12-mm.

"TULSA RETAILERS' TRIBUNE"
(Tulsa, Oklahoma),
August, 1931.

Check Whole Wheat Biscuit for Food Value

Two Whole Wheat Biscuits
With Milk Supply
Six Vitamins

Ten different mineral salts and six vitamins in a single dish of cereal and cream is the latest achievement of scientific food planning at the Kellogg company plant. Kellogg's Whole Wheat Biscuits, the manufactured product of this careful planning, are certified by the Medical Arts Laboratory of Philadelphia for their high food value.

Two biscuits with milk or cream supply about half of the average person's daily requirements of both calcium and phosphorus, and one-fourth the iron necessary, as well as many other minerals.

INTERESTING PROCESS

The analysis of the Philadelphia laboratory reveals in Whole Wheat Biscuits, served with milk or cream, vitamins A, B, C, D, E, and G. The biscuits themselves are a good source of vitamin G.

Made from whole wheat, the biscuits are the product of a most interesting process of manufacture. Having been thoroughly cleaned, the wheat is cooked in rotary steam cookers, after which it is tempered. It is then fed through several mills with grooved rollers, which form the fine shreds seen in the finished product. Machines shape the biscuits and drop them onto trays, which are then passed through the oven, double-toasting the biscuits and giving them a rich, golden brown color on both sides. An evaporator reduces the moisture content to between 1 and 2 per cent, thus insuring the crispness of the biscuits. A steady stream of trays moves from the evaporator to the packing machines where the biscuits are placed in cartons, 15 in each package. A recently developed corrugated strip, designed to minimize breakage in shipment, is placed between each layer of biscuits.

The delicious flavor of Kellogg's Whole Wheat Biscuits gives them a tremendous appeal aside from their food value.

They supply energy, build up the body, and keep the teeth as well as the entire system.

Parina Dog Chow

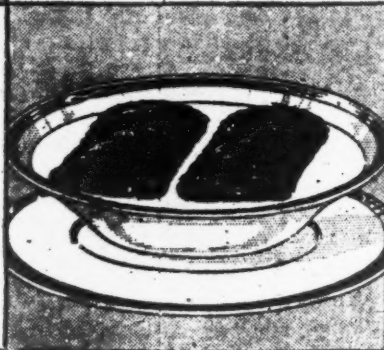
Now at Your Grocer

Seeing is believing— look at this new and improved Whole Wheat Biscuit



See how they
are toasted on
both sides

See how nicely
two fit in the
bowl



DON'T put off trying Kellogg's WHOLE WHEAT Biscuit. They're extra crisp because they're toasted top and bottom. And every red-and-green package is certified for food value.

When you eat two of these rich whole-wheat shreds with milk or

cream your system gets ten important mineral salts and six vitamins. *Think of it*—more than a third of your daily mineral requirements.

Order from your grocer. Fifteen biscuits to the package. Made by Kellogg in Battle Creek.

Kellogg's WHOLE WHEAT
BISCUIT

Look for Food Value



Biscuits are made by a special process that guards practically all the elements of the rich whole wheat.

Each time you eat Kellogg's WHOLE WHEAT Biscuit, you get calcium and phosphorus for teeth and bones. Iron and copper for red blood. Vitamins for health...as well as many other vital food elements.

Served with milk or cream, two of these tempting biscuits supply more than a third of the average person's daily mineral requirements.

Order a package of Kellogg's WHOLE WHEAT Biscuit from your grocer. Made by Kellogg in Battle Creek.

★ Each package of Kellogg's WHOLE WHEAT Biscuit is certified for food value. Look for the analysis on the side panel. Each biscuit contains 10 important mineral salts. A bowl of milk and two biscuits will supply about half your daily requirement of calcium...half the phosphorus you need...nearly a fourth the iron, as well as many other food elements, including the vitamins A, B, C, D, E, G. **IMPORTANT:** Copper is present, which makes the iron salts all the more assimilable. Recent scientific research indicates that copper is necessary to prevent anemia.

Kellogg's WHOLE WHEAT BISCUIT

We Deliver

Town Crier 25c

[illegible]

Vertical text on the right margin, likely a page number or reference.

It Pays to Be Thrifty ... Trade at The

CITY MARKET

Fryers

22c

Franklin Park, N. J.

Roast:

12

701

— 21 —

Roast.

250

121c

25c

3021

Low Crop, Inc. ----- 19c
But Jar

1000 1000

29c

1920

Every Book Free, 2 for 25c

**GOLD MEDAL
FLOUR, 48 lbs.,
\$1.25**

1991

11-11-11

100

1

105

250

100

11

200

100

75c

55c	25c
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City

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1991

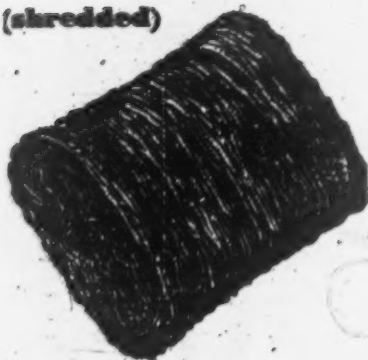
11

Plaintiff's Exhibit No. 12-00.

"NEW BEDFORD TIMES"
(New Bedford, Massachusetts),
May 19, 1931.

A new WHOLE WHEAT Biscuit

(shredded)



KELLOGG'S WHOLE WHEAT Biscuit are made of delicious shreds of whole wheat. They have a rich flavor that you'll delight in. And many other improvements. Every biscuit is toasted top and bottom — extra crisp on both sides.

Kellogg's WHOLE WHEAT Biscuit are a convenient size — two just fit the cereal bowl. And you get 15 biscuits in every red-and-green package.

Order these different biscuits from your grocer. Made by Kellogg in Battle Creek.



Plaintiff's Exhibit No. 12-pp.

"THE BETHLEHEM GLOBE-TIMES"

(Bethlehem, Pennsylvania),

April 7, 1931.

his mother, who cares for him

A NEW WHOLE WHEAT Biscuit

(shredded)

KELLOGG'S WHOLE WHEAT Biscuit are made of delicious shreds of whole wheat. They have a rich flavor that you'll delight in. And many other improvements. Every biscuit is toasted top and bottom — extra crisp on both sides.

Kellogg's WHOLE WHEAT Biscuit are a convenient size — two just fit the cereal bowl. And you get 15 biscuits in every red-and-green package.

Order these different biscuits from your grocer. Made by Kellogg in Battle Creek.



Donald's home life is as pleasant and cheerful, a product of good management and of the harmony which exists between his parents. It is no secret that his feet, greets the world with a smile and every new experience with eager interest.

Such a background is the birth-right of every child. With good health and a fine, sensible home back of him, he can start without handicaps to make the acquaintance of the larger world outside his home.

He is ready to make friends. His pleasant personality and engaging eagerness send him off on the right foot. He is all set to meet the world and enjoy it.

The child whose home conditions

Genuine Steam Waves
Shampoo Wave including Finger \$4.00
All Our Work Guaranteed
Manicuring 35c
Facials 50c
Finger Waves 75c
Hair Trims 1.00
Phone 4722 for Appointment

SUPERCURLINE BEAUTY SALON

714 W. Third St., Bethlehem, South Side.
CATHERINE BURNS, Mgr.

SHREDDED WHEAT

WITH ALL THE BRAN
OF THE WHOLE WHEAT



"MEET AT
MY HOUSE!"

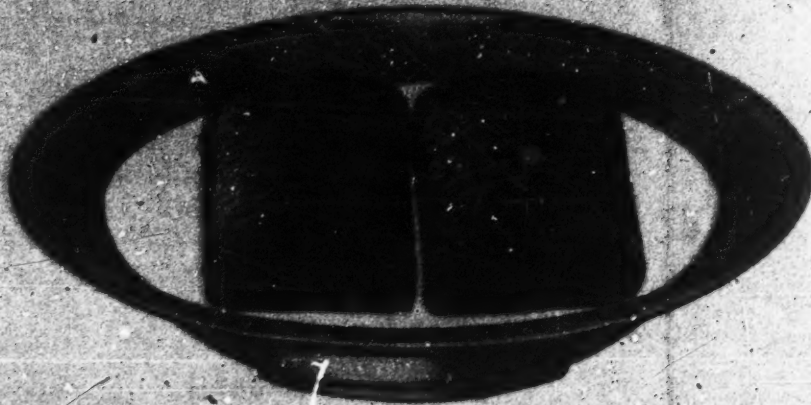
Telephone your
friends—make it a
"date." They'll be
a party at your house.



TELEPHONE

Kellogg's

**WHOLE WHEAT
BISCUIT**



15 BISCUITS

12½ OUNCES

Kellogg's

SHREDDED WHOLE WHEAT BISCUIT

HELP YOURSELF TO HEALTH

W. K. Kellogg



KELLOGG COMPANY, BATTLE CREEK, MICH.
CLEVELAND, OHIO LONDON, ENGLAND LONDON, CANADA SYDNEY, AUSTRALIA

in each
package

2 Biscuits
fit your
cereal bowl



Plaintiff's Exhibit No. 13-c.

Kellogg's
SHREDDED
whole wheat
BISCUITS

15 Biscuits in every Package

 *for*

Plaintiff's Exhibit No. 14-a.

"MOON-JOURNAL"
 (Battle Creek, Michigan),
 May 10, 1929.



Kellogg's
 Shredded
 Wheat Biscuit. **11c**

XXXX Sugar Per lb. **10c**

Cucumbers Good Size **10c**

HEAD LETTUCE Solid Heads 2 for **25c**

RINSO Large Pkg. **23c**

Quality Service **BUTTER** 1-Pound Carton **49c**

Plaintiff's Exhibit No. 14-b.

"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.

Kellogg's
Shredded Whole
Wheat Biscuits



Wax Be
Head Le

FOR MOTA



CHOCOLATE
Cherrie
The ideal gift to
Luscious cream

He
Fo

Why pay
famous

Mustard Sauce
Peanut Butter
Baked Beans
Vegetarian
Kidney

Country Club
Olives

Our own importation of the finest
that Spain produces

Plaintiff's Exhibit No. 14-c.

"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.

Bananas FANC
Fruit

BC

Kellogg's Shredded Wheat Per
Pkg. **10**

Sugar Pure Cane **10** lbs. **57c**

Bring Your Fould's Coupons to the R Stores

RADIO

Reserve R-Grocer's Friday
program time. It's 8:15
P. M. (Eastern Time)

W J R

(Detroit)

OWNED Chain Stores—Rite-Way System

Plaintiff's Exhibit No. 14-d.

"MOON-JOURNAL"
 (Battle Creek, Michigan),
 May 10, 1929.

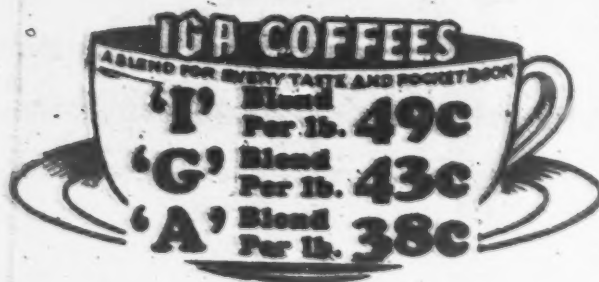
Kellogg's Shredded Wheat 11c

Puffed Wheat Quaker Pkg. **12c**

Lux Soap Flakes Pkg. **10c**

Apricots Del Monte Peeled No. 2 Can **20c**

Pork and Beans Campbell's Can **9c**



Mayonnaise I.G.A. 8-oz. Jar **23c**

Wax Beans I.G.A. 2 No. 2 Cans **37c**

Plaintiff's Exhibit No. 14-c.

"MOON-JOURNAL"
(Battle Creek, Michigan),
May 10, 1929.



15 CRISPY
BISCUITS
FOR
10c

RINSO

SOAKS CLOTHES CLEAN

BIG
BOX 21c

This is Campbell's
Soup Week

1 different Soup
for every day!

Asparagus	Mulligatawny
Bean	Mutton
Beef	Ox Tail
Bouillon	Pea
Calary	Pepper Pot
Chicken	Printanier
Chicken Gumbo	Tomato
Clam Chowder	Tomato-Olives
Consommé	Vegetable
Julienne	Vegetable-Beef
Mock Turtle	

Campbell's famous 21 kinds



YOUR
CHOICE

6 CANS
FOR... 57c

**YOU ARE
INVITED!**
For Your Health's
Sake
TO A
Demonstration
OF THE WORLD-RAMOUS
**BATTLE CREEK
SANTARIUM
HEALTH FOODS**

At our downtown store
all this week, you are
offered free consulta-
tion with our expert
dietician.

Turnstile Coffee Per Lb. 37c
FRESHLY ROASTED ALWAYS

HEINZ Fresh Cucumber
Pickles, Big Jar 19c

HEINZ Fresh Cucumber Polish
Big Jar 19c

Kidney Beans 2 Cans for... 25c

JOAN OF ARC

Lima Beans 2 Cans for 25c

Plaintiff's Exhibit No. 14-f.
 "ENQUIRER & EVENING NEWS"
 (Battle Creek, Michigan),
 May 10, 1929.

General Advertising
 Space for three sides

Kellogg's Shredded Wheat 11c

Good Peaches Large Can 25c

Milk Pet or Carnation 3 Large Cans 29c

Gold Dust Large Package 23c

SUGAR, XXXX 10c

Cucumbers Good Size 10c

Head Lettuce Solid Heads, 2 for 25c

Rinso Large Package 23c

Quality Service Butter 49c

SUGAR 5 lbs. 29c

Strawberries qt, box 25c

Nice Clean Full Measure. "When we say good — we mean good."

Mershon's Grocery
 208 Cherry St. Phone 7711

Brown & Johnson

Wm. Murray
 756 Maple St. Phone 5714

Alliance Merc. Co.
 43 Aldrich St. Phone 5212

Wm. R. Alden
 572 Maple St. Phone 2-3732

H. F. Smith
 633 Lake Avenue Phone 7311

Frank Cushman

Plaintiff's Exhibit No. 14-g.
"ENQUIRER & EVENING NEWS"
(Battle Creek, Michigan),
May 10, 1929.

167

Kellogg's Shredded Wheat 11c

Mayonnaise I.G.A. 8-oz. Jar **23c**

Wax Beans I.G.A.—2 No. 2 Cans **37c**

Raisins I.G.A. Seedless—2 lb. pkg. **19c**

Salt I.G.A.—Iodized or Free Running—2-lb. pkg. **10c**

Oriental—No. 2 Can

Bean Sprouts 19c

Sweet Pickles Quart Jar— **39c**

Dill Pickles Quart Jar— **25c**

Inspiration Cleaner—Can **35c**

*Tune in on WMAQ and Hear "AF" and "Pete," Inspiration
Cleaner Stars — Four Times Every Week*

HOME
OWNED
STORES



IVORY
AND BLUE
FRONTS

Independent Grocers' Alliance

May 10, 1929.

Unusual Bargains
Don't miss these offers

Kellogg's Shredded Wheat 11¢

Good Peaches Large Can 25¢

Milk Pet or Carnation 3 Large Cans 29¢

Gold Dust Large Package 23¢

SUGAR, XXXX 10¢

Cucumbers Good Size 10¢

Head Lettuce Solid Heads, 2 for 25¢

Rinso Large Package 23¢

Quality Service Butter 49¢

SUGAR 5 lbs. 29¢

Strawberries qt. box 25¢

Nice Clean Full Measure. "When we say good — we mean good."

Merzhan's Grocery
200 Cherry St. Phone 7711

Brown & Johnson
600 W. Mich. Ave. Phone 3797

A. J. Pooley Grocery
100 Meacham Ave. Phone 9432

Wm. Murray
750 Maple St. Phone 5714

Alliance Merc. Co.
48 Aldrich St. Phone 8912

Ed. O'Connor
96 Meacham Ave. Phone 4212

J. R. Doig
249 E. Mich. Ave. Phone 7811

Wm. R. Alden
572 Maple St. Phone 2-3732

H. F. Smith
632 Lake Avenue Phone 7311

Frank Cusmano
256 Main St. Phone 2-3611

P. L. Meehan
456 Lake Ave. Phone 9322

Kellogg's Shredded Wheat 11c

Mayonnaise I.G.A. 8-oz. Jar **23c**

Wax Beans I.G.A.—2 No. 2 Cans **37c**

Raisins I.G.A. Seedless—2 lb. pkg. **19c**

Salt I.G.A.—Iodized or Free Running—2-lb. pkg. **10c**

Oriental—No. 2 Can

Bean Sprouts 19c

Sweet Pickles Quart Jar— **39c**

Dill Pickles Quart Jar— **25c**

Inspiration Cleaner—Can **35c**

*Tune in on WMAQ and Hear "Al" and "Pete," Inspiration
Cleaner Stars — Four Times Every Week*


HOME
OWNED
STORES



IVORY
AND BLUE
FRONTS

Independent Grocers' Alliance

Plaintiff's Exhibit No. 14-h.
 "ENQUIRER & EVENING NEWS"
 (Battle Creek, Michigan),
 May 10, 1929.



PIGGLY WIGGLY
Popularity

Know the joys of marketing with a crowd—yet being alone. At Piggly Wiggly you enter—just one at a time—no confusion—no waiting. It's a privilege to shop the Piggly Wiggly way, because you are privileged to use your own judgment without interference or suggestion.

Strawberry—Raspberry—Peach—Blackberry and Pineapple.

BUTTER

Fresh Creamery

Riverside—Our Best —
 Pound

Carton **49c**

Plain Wrapped — It's
 Good—

Pound **45c**

Pure Preserves

Pound **25**

New Cabbage

Per
 Pound **5**

Head Lettuce

Each **8½**

Palmolive Soap

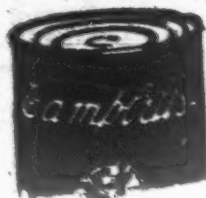
3 Bars
 for **20**



15 CRISPY
 BISCUITS FOR

10c

THIS IS CAMPBELL'S SOUP WEEK



Plaintiff's Exhibit No. 14-i.
 "EATON RAPIDS JOURNAL"
 (Eaton Rapids, Michigan),
 April 24, 1931.

CULVER'S

All Week Specials

SHREDDED WHEAT (Kelllogg's) package	10c
FIG BARS, 2 pounds	25c
PINEAPPLE, fancy, No. 2 1/2 can	26c
CALUMET BAKING POWDER, pound can	27c
PRUNES, extra large, per pound	13c
OXYDOL, large package	23c
PICKLES, Flavorite, 6 oz. bottle	8c
COCOA, 2 pound can	25c
RADIUM FLOUR, per sack	53c
CHASE & SANBORN'S COFFEE, per pound	37c
TEA ROLLS, dozen in package	5c

Fresh Fruits and Vegetables
for Easter

E. M. CULVER

Phone 47 F 2

We Deliver

Plaintiff's Exhibit No. 14-j.
 "EATON RAPIDS JOURNAL"
 (Eaton Rapids, Michigan),
 April 24, 1931.

All Week Specials

ALL WEEK SPECIALS — April 25 to May 2

PINEAPPLE, large 2½, fancy Dole 1, per can	26c
PRUNES, 30-40 size, per pound	13c
FLAVORITE PICKLES	8c
SHREDDED WHEAT BISCUIT, Kellogg's	10c
RED BEANS per can	6c
MILK, Libby's, 3 large cans	23c
SOAP CHIPS, Quick Arrow, 2 large packages (Two Sunbrite Cleanser Free)	35c
SALSODA, 2½ pound package, 2 packages	15c
SPINACH, Chef, 2½ can, per can	18c
LUX TOILET SOAP, 3 bars	20c

— SATURDAY SPECIALS —

Rinso, large package	21c
Radium Flour, 24½ pound sack	54c
Chef Coffee, per pound	36c
Liquid Veneer Furniture Polish, large	59c
Crepette Dust Cloth Free (regular 25c value)	
Fresh Fruits, Vegetables, Strawberries	

W. W. KNAPP

Phone '82

Eaton Rapids

C. P. SPRINGER

Phone 305 F 5

Petrieville

Plaintiff's Exhibit No. 14-k.
 "ENQUIRER & EVENING JOURNAL"
 (Battle Creek, Michigan),
 May 10, 1929.

Banner Nut Oleo ^{25c} Quality **2 Lbs. 35c**

One Pound Crisco 25c

One Measuring Glass FREE with Each 1-lb. Tin

Head Lettuce ^{Fresh and Crisp} ^{Per Head} **10c**

Grapefruit ^{Full of Juice} **4 for 25c**

Bananas ^{Fancy Fruit} **3 Lbs. 23c**

Kellogg's Shredded Wheat ^{Per Pkg.} **10c**

Sugar Pure Cane **10 Lbs. 57c**

Bring Your Fould's Coupons to the R Stores

RADIO

Reserve R-Grocer's Friday
 program time. It's 8:15
 P. M. (Eastern Time)

W J R

(Detroit)

OWNED Chain Stores—Rite-Way System

Plaintiff's Exhibit No. 14-L

"THE HERALD-STAR"

(Steubenville, Ohio),

September 4, 1931.



Squ

Whether you go a
week-end, you will
that will furnish a

Saturday

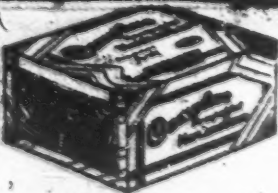


Ft. Steuben

MILK

4 cans 23¢

Kellogg's Shredded 2
Wheat Biscuit pkgs. 25¢



Campfire
Marshmallows
lb. 22¢

Fresh Fruits & Vegetables

Plaintiff's Exhibit No. 14-m.

"CIRCLEVILLE HERALD"

(Circleville, Ohio),

March 27, 1931.

Plp. Ex. 14-m.

SERV-U-WELL



SHREDDED WHEAT Kellogg's pkg. 13c

Tomato	sm.	13c
Ketchup	Beecham	lge. 23c
Crisco	3 lb. can	71c
Soda Crackers	2 lb. box	33c
Macaroni		
Spaghetti	Crescent Brand 3 pkgs.	23c

Laurelville	24 lb.	
Flour	bag	65c
Butter	Gold Bar lb.	37c
Salmon	tall can	14c
Canned Peas	Tender Early June can	15c

SERV-U-WELL COFFEE lb. 32c

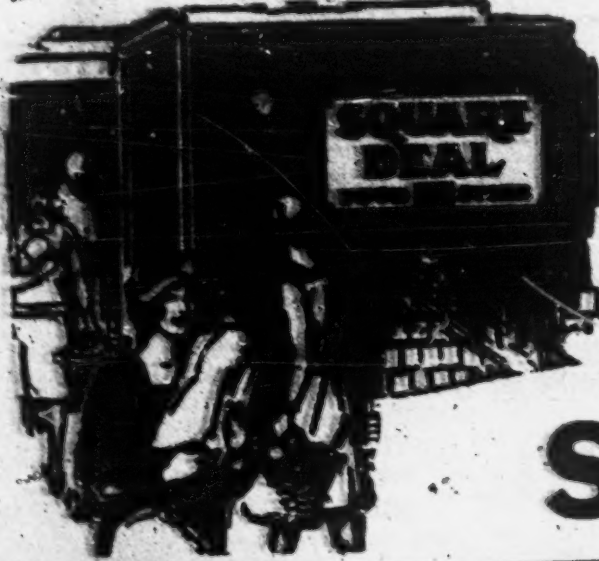
Oranges	160 Size Navels	doz.	41c
Onion Sets	lb. 10c	3 lbs.	28c
Celery	Large Stalks	each	14c
Potatoes		3 lbs.	25c

Grape Fruit	54-64 Size	4 for	30c
Spinach		2 lbs.	23c
Cabbage	New	lb.	5c
Head Lettuce		each	10c

Serv-U-Wel Toilet Tissue 4 rolls 27c

Matches	6 Box Carton	21c
Ivory Soap	3 bars	22c
Peanut		
Ivory Flakes	Sm.	10c
Pumpkin	No. 2½ can	15c

September 4, 1931.



Sq

Whether you go a
week-end, you will
that will furnish a

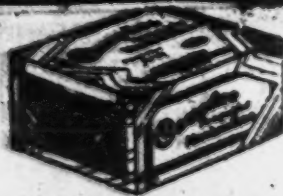
Saturday



Ft. Steuben
MILK

4 cans **23¢**

Kellogg's Shredded 2 **25¢**
Wheat Biscuit pkgs.



Campfire
Marshmallows
lb. **22¢**

Fresh Fruits & Vegetables

Malaga Grapes, 2 lb. **19c**
Peaches 2 lb.

March 27, 1931.

Plp. Pl. 14 -

SERV-U-WELL

TRADE MARK



SHREDDED WHEAT Kellogg's pkg. 13c

Tomato	sm.	13c	Laurelville	24 lb.	
Ketchup	Beecham	lge.	23c	Flour	bag 65c
Crisco	3 lb. can	71c	Butter	Gold Bar	lb. 37c
Soda Crackers	2 lb. box	33c	Salmon	tall can	14c
Macaroni			Canned Peas	Tender Early June	can 15c
Spaghetti	Crescent Brand	3 pkgs. 23c			

SERV-U-WELL COFFEE lb. 32c

Oranges	180 Size Navels	doz.	41c	Grape Fruit	54-64 Size	4 for	30c
Onion Sets	lb. 10c	3 lbs.	28c	Spinach		2 lbs.	23c
Celery	Large Stalks	each	14c	Cabbage	New	lb.	5c
Potatoes		3 lbs.	25c	Head Lettuce		each	10c

Serv-U-Wel Toilet Tissue 4 rolls 27c

Matches	6 Box Carton	21c	Ivory Flakes	Sm.	10c
Ivory Soap	3 bars	22c	Pumpkin	Lg.	23c
Peanut Butter			Royal Anne	No. 2½ can	15c
Butter	Fall Ant Jars	22c	Cherries	No. 2½ can	32c

Plaintiff's Exhibit No. 14-n
 "CIRCLEVILLE HERALD"
 (Circleville, Ohio),
 March 27, 1931.

U.S. Stores

for better groceries

FLOUR Cloverdale 24 1/2 Pound Sack 65c

PURITAN MALT 2 Big Cans 79c

COFFEE KLECKO Lh. Can 29c
 PEERLESS 2 Lbs. 49c
 PAN-AMERICAN 2 Lbs. 39c

SHREDDED WHEAT 2 Pkgs. 19c

EARLY OHIO
SEED POTATOES 100-110 Sigs \$2.25

Cherries or Pears Big Can 25c

GRAPE FRUIT, 34-64 Size..... 5c

SUNKIST ORANGES, 250 Size..... Doz. 23c

SUNKIST ORANGES, 216 Size..... Doz. 27c

KING HEAD LETTUCE, Large Size..... 3 for 25c

EXTRA LARGE CAULIFLOWER..... 75c

Plaintiff's Exhibit No. 14-o.

"THE AURORA-BEACON-NEWS"

(Aurora, Illinois),

October 16, 1931.

Large Size 21c

KELLOGG SPECIALS—

SHREDDED WHEAT or
RICE KRISPIES, pkg.

10c

Model Airplane and
1 lb. Masterbilt coffee 50c



The plane is the "Unbreakable Ace" a \$1.50 value that will rise off the ground, fly 75 to 200 feet and stand nearly any crash without injury.

The coffee is one of the world's best. Masterbilt has given continuous satisfaction to Urma customers for many years.

BULK COFFEE, Exceptional drinking qualities for a coffee at this price. Lb. 23c

Plaintiff's Exhibit No. 14-p.

"THE DAILY NORTHWESTERN"

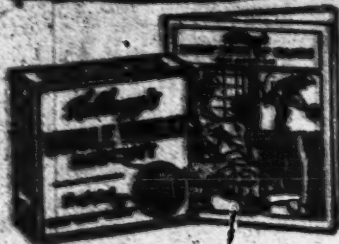
(Oshkosh, Wisconsin),

March 18, 1932.

~~Utah Milk 4 25c~~

Wax or Green Beans
a good quality 2 Cans 19c

Kellogg's Shredded Wheat



Story and Game Book Free

2 pkgs

23c

JOHNSTON'S

Graham Dots 15c

A New Graham Cereal

Cookies Special 1b 23c

Sandwich Shorts - Delicious Cream Filling. Regular 30c Value

Enzo Jel All Flavors 3 Pkgs 19c

Orga Coffee Blue Pkg 1b 21c

Gold Dust Large Pkg 21c

Oranges 28c 2 52c

Plaintiff's Exhibit No. 14-r.
 "EVENING WORLD-HERALD"
 (Omaha, Nebraska),
 April 8, 1932.

Monte Crushed Apple No. 2 1/2 can .. 15c	Silver Bar Country Gentleman, Golden Bantam or Crosby CORN 3 for 29c No. 2 can ..
H. J. Heinz KETCHUP Large Size Bottles Each, 17¢ 3 for 49c	Sunset Creamery BUTTER 1-Pound carton 18c Do not clean this butter with lower grades usually sold at so called bargain prices.
Del Monte Fancy Early Garden PEAS No. 2 Cans .. 15c	SUGAR G. W. 10-lb. Cloth Bag 45c Domino Sugar, 2-lb. Can.
KELLOGG'S PRODUCTS Corn Flakes Large Size Reg. 10c	Shredded Wheat Minute, Nursery Rhyme Best Free. Reg. 10c
Best of Eden Preserved FIGS 16-oz. 23¢ 9-oz. 10c Glass Can	Silver Leaf SOAP Bar 2c Box of 100 Bars, \$2.00
Del Monte Royal Anne Cherries: No. 1 can, 19¢, No. 2, 23¢, No. 2 1/2, 31¢ Del Monte Fruit Salad, No. 1 can, 21¢, No. 2, 25¢, No. 2 1/2, 33¢ Trade Tomato, medium can 3 for 25¢ Large Brand Sifted Peas; No. 2 can 10c	

Plaintiff's Exhibit No. 14-a.

"HOUSTON CHRONICLE"

(Houston, Texas),

March 25, 1932.

Butter ^{1-lb. Pkg.} 27c

Plato Salad Oil

Pint Cans 19c

Shredded Wheat

(KELLOGG'S) 10c
Per Pkg.

OCEAN SPRAY

Cranberry Sauce ^{11-oz. Tin} 2 for 31c

(2-4-oz. Ocean Spray Cranberry Juice Cocktail FREE)

WHY YOU LOOK AT IT IGA COFFEES SATISFY

12 Vacuum Packed Coffee Delux 35c

EXTRA FANCY

Winesap Apples

2 Doz. 25c

Calif. Red Ball Lemons

doz. 13c

Prices Slightly Higher at Points Outside Houston Account of Transportation Charge

I.G.A. STORES

THOUSANDS OF STORES FROM COAST TO COAST

There Are 15 "Miss
Classifieds" at Your
Service...Each One

Plaintiff's Exhibit No. 14-t.

"WICHITA FALLS DAILY TIMES"

(Wichita Falls, Texas),

June 19, 1931.

FRIDAY, JUNE 19, 1931

THE RED & WHITE STORES

Kumer's
Economy
No. 1 Can

12½c

SHREDDED WHEAT

Kellogg's
Large
Package

10c

COMPOUND

Flake White
Pure Vegetable
3 Pounds

85c

MILK

Red and White
6 Small or
3 Tall

21c

FLOUR

Wichita Loaf
24 Pounds

53c

3 Cans

21c

SOAP

Procter & Gamble's "Luna"
White Laundry
20 Bars

25c

GRAPE JUICE

Church's

Quarts. 39c Pints. 21c

COFFEE

Maxwell
House

1 Lb. Can

29c

TEA

Red and White
The Perfect Blend

½-lb. 44c — ¼-lb. 23c

REVALENT

Plaintiff's Exhibit No. 14-u.

"SALT LAKE CITY TRIBUNE"

(Salt Lake City, Utah),

May , 1931.

SEWELL'S

United Stores

335 So. State
575 E. 1st So.
54 E. 1st So.404 6th Ave.
405 N. 2nd W.
679 So. State571 E. 9th So.
1246 S. 9th E.
1057 E. 21st S.501 E. 3rd So.
608 W.N. Tem.
624 E. 21st S.

We Reserve the Right to Limit Quantities.

Peanut Butter nuts 2 lbs. 35c
Shredded Wheat Kellogg's Pkg. 10cPotato Chips—Bulk Lb. 33c
Old Dutch Cleanser, 3 Cans 25c

ORANGES

SUNKIST

2 doz. 25c

WHITE KING

Granulated Soap

Lg. pkg. 39c. 23c
20-oz. pkg.Lettuce Solid Heads 2 for 9c
Green Peas lb. 8c
Lemons Sunkist Doz. 25c
Spinach Fresh Cut 4 lbs. 9cNew Potatoes 5 lbs. 19c
Onions Sweet Spanish 10 lbs. 15c
Oranges Large, Full of Juice Doz. 29c
Asparagus New Utah 2 lbs. 15c

SATURDAY MARKET BARGAINS

To economize in your home, it pays to purchase quality at all times, regardless of the item you need. If you are one of the few who are not purchasing your meats at one of our markets, drop in Saturday, purchase your wants, then you be the judge.

Stewing Hens Sewell's Quality lb. 17cYearling Mutton Grain-Fed, Leg Roast lb. 17cPork Roast Shoulder Hock End lb. 14cBaby Pot Roast Shoulder Cuts lb. 10c

Young Mutton Breast 3 lbs. 25c

Pork Roast Pig Pork, Shoulder Best Cut lb. 19cPrime Over Roast Steer, RibsRoasted Ham Tender and lb. 35c

It For Less At

DKIN'S123
West
"B"
St.

e the Crowds Go"—

Specials for FRIDAY and SATURDAY
Sept. 4th and 5thonly give you
sands of good
d that — Our
ne fresh goods**Price**—the lowest, of course,
due to our tremendous
volume and buying
power—**Service**through our big
force of competent
clerks — ready to
serve you with a
smile—

1-lb. Can

35c

2-lb. Can

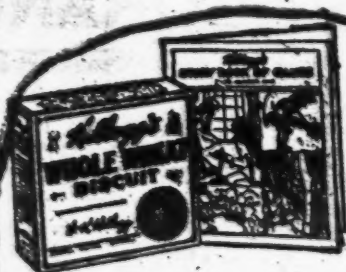
69c**31c**

Fish FREE with Each Deal

29c**Potato
Chips**

Large 25c bag

3 for

19c

- 1 Pkg. Kellogg's Corn Flakes
- 1 Pkg. Kellogg's Shredded Wheat
- 1 Pkg. Kellogg's Rice Krispies

All
for**29c**And a Story Book of
Games—FREE**Ketchup**

Graber's

Salmon

Plaintiff's Exhibit No. 14-w.

BOULDER, COLORADO, NEWSPAPER,
April 3, 1931.

Page Five

Solitaire
Coffee**HOME OWNED STORES****Solitaire**
GROCERIESYOU WILL FIND MERCHANDISE OF FIRST QUALITY AND PRICED
CHEAPER IN ALL HOME-OWNED STORES**Salad
Wafers**

2-lb. Package

26cMerchants Biscuit
Company

Supreme Quality

MARSHMALLOWS, Lb. . . . 23c
Fresh, Bulk**RICE, Large Head, 2-lb. Pkg. 23c****SOC-JEL, 11 Whips, 3 Pkgs. 23c****DR. PRICE'S BAKING****POWDER, 12-oz. 23c****BAKER'S Chocolate, 1/2 lb. 23c****BAKER'S COCOA, 1/2 lb. . . . 23c****SUGAR, Powdered, 2 1/2 lbs. 23c****SUGAR, Brown, 2 1/2 lbs. . . . 23c****Fresh
Asparagus**

2 Pounds

25c

No. 1 Grats

at a very attractive
price.**SOLITAIRE VANILLA EXTRACT**4-oz. Bottle **38c****Potatoes**

15 Pounds

19c

Firm White

A Colorado Product

PEACHES, Dried, lb. 23c**PRUNES, Good Size, 2 lbs., 23c****BLACK FIGS, 2 lbs. 23c****APRICOTS, Dried, lb. 23c****RAISINS, Seedless, 2 lbs. . . 23c****RAISINS, Seed, Pkg. . . . 13c****KELLOGG'S SHREDDED****WHEAT, 2 Pkgs. 25c****FOOD OF WHEAT 28-oz pkg 15c****Oranges**

Per Dozen

27c

Large, Juicy

THOMSON'S MALTED MILK

42c

Plaintiff's Exhibit No. 14-x.

"JOURNAL"
(Minneapolis, Minnesota),
April 15, 1932.

Fairway

Fine Foods

Specials for Saturday, April 16

Why spend your valuable time "shopping" for food values when you'll find them so easily at your nearest Fairway store! Every Fairway value is of known high quality, too. Notice these low prices for these products you prefer to buy—and remember that every item in our store is priced low to give your food dollars greater buying power. Shop quickly and wisely—the Fairway.

TOMATO SOUP

FAIRWAY

Real Tomato Flavor
Seasoned Just Right

4 CANS 23c

SUGAR

FINE GRANULATED

10 LBS. 45c

COFFEE

SERV-WELL

Mild, Mellow Flavor
Vacuum Sealed

1 LB. CAN 34c

QUAKER CRACKLE

PKG. 10c

JELL-O

CHOICE OF ALL FRUIT FLAVORS

4 PKGS. 25c

RAP-IN-WAX

The quality waxed paper of many uses.
Better for usual uses and useful in many
ways never before considered possible with
waxed paper.

SERVING
ROLL 19c

BRILLO

Cleans, scrubs, polishes in one operation!
Twice as fast—five times easier! Un-
equalled for aluminum and all kitchen
utensils, glass, enamelware, etc.

LARGE
PKG. 19c

PABST-ETT CHEESE

PKG. 15c

SODA CRACKERS

WALDORF

Fresh
Crust

2 LB. CADDY 21c

PEAS

SERV-WELL

Small Shelled

2 NO. 2 20c

KELLOGG'S SHREDDED WHEAT

PKG. 10c

PINEAPPLE

SERV-WELL

SWEET

2 CANS 35c

WHEAT FLAKES

LARGE PKG. 21c

LAUNDRY SOAP

BIG 4 oz
CRYSTAL WHITE

10 BARS 25c

FRUITS AND VEGETABLES

Rhubarb

Fancy Mammoth
Strawberry Variety

2 LBS. 17c

Oranges

Medium Size
Sweet Navels

2 DOZ. 55c

Asparagus

Fancy Green

2 1/2-LB. BUNCHES 11c

Carrots

Fancy California

2 LARGE 11c

Plaintiff's Exhibit No. 14-y.

"JANESVILLE DAILY GAZETTE"

(Janesville, Wisconsin),

May 19, 1931.

SWANSON'S

ONE CALL FOR ALL

933 Western Ave.
Phone 128

18 Racine
Phone 835.

318 Western Ave.
Phone 3411

Hills Bros. Coffee, lb. . . . 39c

Butter, Fresh Creamery, lb. . . 21c

Swanson's Best Blend Coffee, lb. . 33c

Bananas, Yellow Fruit, lb. . . . 5c

Green Onions or Radishes, home grown,
3 bunches 10c

Milk, 3 tall cans 21c

Soda or Graham Crackers, 2-lb. box 25c

Flour, Mandalay, $\frac{1}{2}$ sack . . . 49c

Flour, Cooper's Best, $\frac{1}{2}$ sack . . 65c

Shredded Wheat, pkg. . . . 10c

P & G Soap, 10 bars 28c

Chipso Soap Chips, large pkg. . . 18c

Boiling Beef, lb. 11c

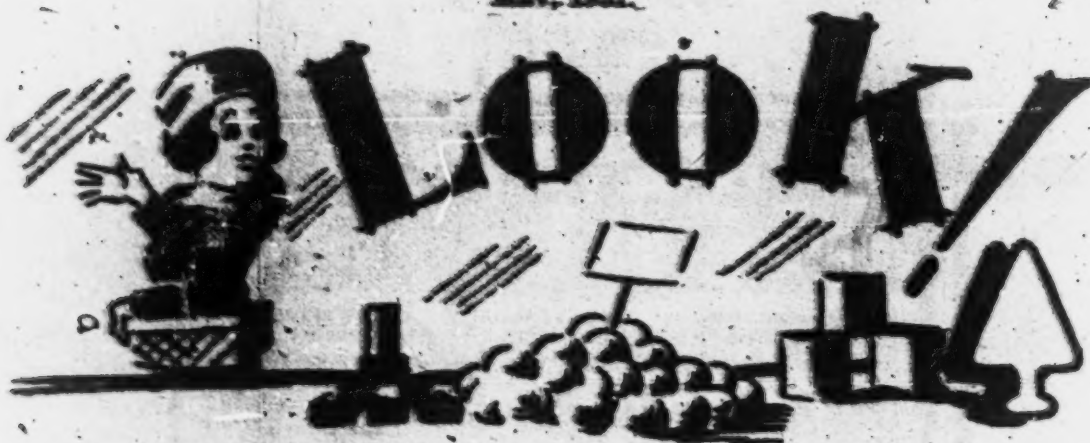
Ham Bones, lb. 12c

Hamburg or Pork Sausage, 2 lbs. . 25c

Plaintiff's Exhibit No. 14-a.

PRESQUE ISLE, MAINE—PAUL X. BEAULIEU.

May, 1931.

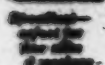


PAUL X. BEAULIEU

PRESQUE ISLE

MAINE

PRICES EFFECTIVE MAY 22nd to MAY 28th, 1931

IVORY
SNOW

2 Pkg. for 25¢

CUT WAX BEANS

HATCHET — — Free from String

Number Two Cans Per Can 19¢

Cloverdale Ginger Ale

PALE DRY AND GOLDEN

16 Oz. Bottles 2 Bottles for 29¢

Silver Bar TOMATOES

— SOLID PACK —

Number Two Can 2 Cans for 23¢

Large Can 2 Cans for 29¢

SILVER BAR—Packed in Heavy Syrup

PEACHES Large Can 21¢

PEARS. Large Can 25¢

HATCHET SWEET CORN

— HATCHET —

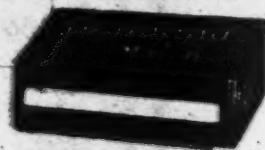
GOLDEN BANTAM CORN

Sweet and Tender

3 Cans for 44¢

DAUFUSKI OYSTERS

10 Oz. Can 25¢



Diamond Matches

— EVERY MATCH PERFECT —

6 Pkg. for 20¢

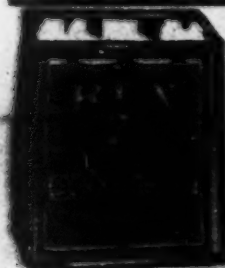
Hatchet Brown Bread

Tall Can 18¢

— BEST FANCY —

Norwegian Sardines

Per Tin 11¢

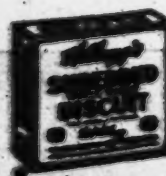
REX
C.C. BEEF

— READY TO SERVE —

Number One Tin 23¢

KELLOGG'S
SHREDDED
WHEAT

No. 11¢



Plaintiff's Exhibit No. 14-aa.

LEE & OADY, FLINT, MICHIGAN.
August, 1931.

CAMAY SOAP, 72s, CASE	4.38
V. C. SARDINES, TOMATO OR MUSTARD, 1s, 48s.	3.89
TABLE KING MILK, BABY, 48s, CASE	1.30
FRENCH'S BIRD GRAVEL, 12s .....	.84
DAZZLE BLACK LIQUID SHOE POLISH, 12s	1.24
FAMO PANCAKE FLOUR, 10-5lb., BALE	2.21
KELLOGG SHREDDED WHEAT, 24s	2.42
WAX PAPER, RAPINWAX, 30-ft. ROLL, 10c, 50s.	3.04
WAX PAPER, RAPINWAX, 100-ft. ROLL, 25c, 25s.	4.03
WILLIAMS' SHAVING SOAP, 12s, CARTON .....	.44

KEN-L-RATION,
MILLER'S HIGH
L. & C. MACHIN
SNOWY PASTRY
AMMCO RAZOR
GOLD DUST CLE
TUNA FISH, QU
WET SHRIMP, P
L. & C. PLAIN Q
L. & C. PRESERV

Kellogg's Pep, 24s, Case . \$2.16

Post Bran Flakes, 24s, Case \$2.16

Kellogg Bran Flakes, 24, Cs. \$1.99



White House Coffee

(VACUUM PACKED)

1-lb., Can, 12s, Case . \$3.72

SC

60

\$

Plaintiff's Exhibit No. 14-bb.

BETTER STORES, ALTOONA, PENNSYLVANIA.

August 14 and 15, 1931.

**BETTER
STORES
VALUES**

YOUR DOLLAR BUYS

**FRIDAY
AUGUST**

25 Recipe Cards

Free

With

Two Packages

**Kellogg's Whole Wheat
Biscuits****2 packages 19c**The new certified for food value cereal
10 minerals 6 vitamins**Sandwich Spread**

Knighthood

8 oz. 19c

Mayonnaise -

Knighthood

8 oz. 19c

Sweet Pickles

Knighthood

quarts 39c

Pickles

Sour or Dil

32 oz. 25c

**Deli
Hot Wheat****PINEAPPLE**First, place a slice of
turkey leaves and then add
apples with cooked rice
and add Knighthood**Extra Fancy Sliced K
Pineapple****Fancy broken slices K
Glory Pineapple****Fairmont****Better Butter****Pickles 8****Morning Glory Qua
Low****Sweets -****Sweet Mixed - Pe**

Plaintiff's Exhibit No. 14-cc.

CINCINNATI, OHIO, COMMUNITY STORES.

April 13 to 18, 1931.

Visit the Food Show at the Auditorium—Next Week, April 13 to 18



COMMUNITY STORES

TWIN CITIES

The following items will be on sale Friday, April 10th and Saturday, April 11th.

Oranges	Large Basket. Per doz.	37c
Head Lettuce	Fancy Solid	2 for 17c
Potatoes	Fancy Baking. Per peck	39c
Celery Hearts	Per bunch	17c
Sugar	10 lb. cloth bags	54c
KELLOGG'S Shredded Wheat	Per pkg.	10c
Mellin's or Spaghetti	3 for	19c



JELLY POWDER

True Fruit Flavors

3 for 19c

Raisins	Fancy Seedless, 15 oz. pkg.	2 for 19c
Time O' Day Coffee	A Special Blend in the new vacuum; 1 lb. tin.	39c
Bread	Good quality, 1 lb. loaf	5c
Apricots	Very meaty, strictly fancy quality. Per lb.	29c
Dates	Time O' Day, 10 oz. package	19c
	Time O' Day, Pitted, 10 oz. pkg.	23c



PEAS

Time O' Day, Garden Best, No. 2 Cans

2 for 37c

Tomka, Sifted Sweet, No. 2 Cans

2 for 25c

CORN

Time O' Day, Golden Bantam, No. 2 Cans

2 for 35c

Tomka Golden, No. 2 Cans

2 for 25c

Sardines

Time O' Day, Fcy. Norway Smoked, in pure olive oil, No. 1/4 cans 2 for 37c

Erick Brand, Special Norway Smoked, in pure olive oil, 1/4 cans 2 for 23c

Powdered Bon Ami

2 for 25c

Fels Naptha Soap

4 for 25c

Crystal White Soap 10 - 31c 1 LARGE FREE

Plaintiff's Exhibit No. 14-dd.
TAYLOR-McLEISH, FLINT, MICHIGAN.
March—April, 1932.

30 to Case

\$4.54

50 to

\$3.09**\$2.**

24 to Case

\$2.09

**Red Seal
Lye**



24 to Case

\$2.19**Bow****\$1.**

All Items Subject To Prior Sale, and Prices Subject
Specials Good March 23 to Ap

Taylor - McLeish
Cash and Co

716 Harrison Street

Phone 2-2921

"NATION WIDE"
(Staunton, Virginia),
March—April, 1932.



MONEY SAVED is MONEY MADE.

— And where can you save with safety as in your Nation-Wide store — where you know the owner — the owner knows you and takes a personal interest in serving you with quality items at money saving prices.

NATION-WIDE HOME OWNED SERVICE GROCERS
WEEK OF MARCH 28th TO APRIL 2nd

Combination Sale

ONE POUND PACKAGE

Madison Hall

Cello-Sealed Coffee || 25c
2 Pounds Gran. Sugar : 7c
BOTH FOR **32c**

One YO-YO FREE

WITH EACH HALF POUND

CAN OF

Toddy Chocolate
Malted Milk 25c

MARIPOSA BRAND
California

Sliced
Peaches 10c

16 OZ.
CAN

Flako
PIE CRUST
2 pkgs.
25c



LONDON HILL BRAND
White and Green
LIMA BEANS

No. 2 CAN **10c**

KELLOGG'S
SHREDDED
WHOLE WHEAT
BISCUIT

2 for **19c**



Kellogg's
Corn Flakes

2 **15c**

KEEP ON HAND A BOX

Cutrite

Wax - aner

Purity White



OPINION OF THE COURT.

(Filed January 11, 1935.)

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

NATIONAL BISCUIT COMPANY,
Plaintiff,

v.

KELLOGG COMPANY,
Defendant.

No. 980. IN EQUITY.

This is a suit in equity by National Biscuit Company, a New Jersey corporation, against Kellogg Company, a Delaware corporation. The bill charges unfair competition. It avers that plaintiff is vested with the exclusive right to whole wheat biscuit made in a particular and distinctive shape, appearance and structure; to the name "Shredded" and "Shredded Wheat" in connection with whole wheat biscuit; and to the representation or picture of whole wheat biscuit made in a particular and distinctive shape, appearance and structure generally and shown in a saucer or dish. Plaintiff prays the court to enjoin defendant "from, directly or indirectly, manufacturing or selling whole wheat biscuit made in imitation and simulation of the said whole wheat biscuit of the manufacture and sale of plaintiff, of particular and distinctive shape, appearance and structure; from employing upon cartons, in advertisements or otherwise the name 'Shredded' in connection with said biscuit; from employing in advertisements or upon cartons containing said biscuit a cut

502378 August 1, 1893	28785 June 7, 1898
520496 May 29, 1894	614338 November 15, 1898
521810 June 26, 1894	618288 January 24, 1899
532286 January 8, 1895	625696 May 23, 1899
532480 January 15, 1895	681656 August 27, 1901
532481 January 15, 1895	35511 December 21, 1901
532697 January 15, 1895	684788 October 22, 1901
532698 January 15, 1895	685671 October 29, 1901
533551 February 5, 1895	683100 September 24, 1901
533552 February 5, 1895	684789 October 22, 1901
533553 February 5, 1895	683101 September 24, 1901
533554 February 5, 1895	678127 July 9, 1901
533555 February 5, 1895	667892 February 12, 1901
533821 February 5, 1895	678625 July 16, 1901
24688 September 17, 1895	681655 August 27, 1901
548086 October 15, 1895	713795 November 18, 1902
548087 October 15, 1895	746145 December 8, 1903
25318 March 31, 1896	770159 September 14, 1904
571284 November 10, 1896	797604 August 22, 1905
571235 November 10, 1896	785554 March 21, 1905
598745 February 8, 1896	

Throughout these patents the word "shredded" is used repeatedly and always as descriptive of the product.

The Perky basic patent No. 548,086, covering both plaintiff's product and process relating to shredded wheat, was granted on October 15, 1895. All subsequent patents claimed by plaintiff and listed on its food packages, as above set forth, have long since expired by limitation, and the subject matter thereof has fallen into the public domain.

The product made by plaintiff is wheat formed into filaments and baked into the form of a pillow shaped loaf. The basic patent discloses a process of boiling the original whole wheat berry, partially drying it and then forcing it between compression rollers one or both of which has peripheral grooves which mash the several parts of the berry into a soft paste. This paste is then forced out by means of combs or scrapers, so as to emerge in thin filaments or shreds. The shreds or fila

ments which proceed from the combs are carried off upon an endless belt and are built up by a succession of layers until a band of the desired thickness is secured. This band is cut into biscuit lengths by knives, leaving the biscuits pressed together at the two ends. The biscuits are then cooked in an oven which raises the top, except at the ends, separating the shreds and making more obvious the interstitial texture of the whole. This patent expired by limitation October 15, 1912.

On September 17, 1895 Perky took out a design patent No. 24,688 upon a biscuit shown in accompanying drawings. One drawing showed a biscuit in plan view. The other drawing showed an end view. This patent would expire by limitation September 17, 1909. In 1908 Judge Kohlsaat declared this design patent invalid upon proof that Perky in his application swore falsely that the design had not been in public use more than two years. *Natural Food Company v. Henry P. Bulkley, et al.* No. 28,530 N. Dist. Ill., East. Div. Instead of removing notice of the Perky design patent from the carton or otherwise notifying the public it was no longer claiming protection under the patent, plaintiff continued for seven years thereafter to warn the public not to make the biscuit as it was under the protection of the government by virtue of this design patent. By its professions and conduct plaintiff secured a monopoly not for fourteen years but actually for twenty years.

In 1905 plaintiff filed an application for the registration of the words "Shredded Whole Wheat" as a trade-mark under the so called "ten year clause" found in the Act of February 20, 1905 (33 Stat. 724, Chap. 592). William E. Williams filed notice of opposition. The proceeding was carried through the patent office to the Court of Appeals of the District of Columbia. The court found that early in 1894 Williams built a machine

"the function of which was to convert the whole grains of wheat into shreds". The court held:

"Since these words [Shredded Whole Wheat] accurately and aptly describe an article of food, which according to the testimony has been produced by Williams and others for more than ten years, it follows that they are descriptive within the meaning of the Statute, and that they cannot be appropriated as a trade-mark by appellant unless it has been the exclusive user of the words during the ten years' period. . . . No claim is made of any attempt on the part of Williams to deceive the public, or that the product of his machines is not in fact as much entitled to be called shredded whole wheat as is the product of appellant's machines. That he did not use the words as a trade-mark, but merely in a descriptive sense is of no moment. He in common with all other manufacturers of shredded whole wheat had the same right to properly designate their product as did The Natural Food Company [the plaintiff here]. The fact that the Patent Office for more than ten years has been granting patents for machines for converting cereals into shreds adds cogency to the contention that the words 'Shredded Whole Wheat' properly describe the product of Williams' machines."

"Moreover, it is open to question whether appellant in fact used these words as a trade-mark until after the enactment of the 'ten years clause' in 1905. The carton used by appellant prior to 1905 contains the figure of a woman holding a torch and a sheaf of wheat. The word 'trade-mark' appears immediately under this figure, indicating quite clearly that The Natural Food Company [the plaintiff here] claimed the figure as its trade-mark and not the words 'Shredded Whole Wheat' which were apparently then used to merely describe the contents of the package." *Natural Food Co. v. Williams*, 30 App. D. C., 348.

Notwithstanding this adverse experience in the Court of Appeals under the ten year clause of the 1905 Act plaintiff secured two registrations of the words Shredded Wheat under the Act of 1920. Unlike registration under the Act of 1905, registration under the Act of 1920 does not carry any presumption of validity or ownership. No move was made to cancel those registrations.

About 1915, some three years after the expiration of plaintiff's basic patent and six years after the expiration of plaintiff's design patent, three employees of plaintiff organized The Ross Food Company, a New York corporation, located at Batavia, for the purpose of entering into competition with plaintiff. Their carton differed from plaintiff's in shape and color. Printed upon the face of their package was an exact reproduction of plaintiff's biscuit with the words "Ross's Whole Wheat Biscuit". They had no small cartons for purchasers of only one or two biscuits. In this situation plaintiff brought suit charging unfair competition. The case was carried to the court of appeals of the Second Circuit. The court held that Ross Food Company had the right to make a biscuit of the exact size and appearance of the biscuit made by plaintiff because by patenting the biscuit plaintiff had dedicated the product, process and design to the public and upon expiration of the patents they were open to public use. The Ross Company was directed to endeavor to band or mark its biscuit, if it could do so, without being under such handicap as would destroy its "indubitable right" to compete with plaintiff by making a biscuit identical with that made by plaintiff.

In a short dissenting opinion Judge Ward indicated the substantial agreement of all members of the

court in the application of general principles except as to the necessity of marking biscuits sold to customers without cartons. He said:

"After the expiration of the complainant's product and design patents, the public generally had the right to manufacture the same article under the same name and in the same form. This was the condition on which the expired monopolies were granted. The defendant concededly does not use the same name; nor sell the article in a similar carton. It sells its article as 'Whole Wheat' biscuit, in entirely different cartons, nor is there any evidence of unfair advertising.

I understand the court to agree that the defendant may make and sell its biscuit in the same form, color, and size as complainant's. The only question is what, if any, protection the complainant should have, in view of the secondary meaning its product has acquired from its mere appearance. When both parties mark their product, unfair imitation of the original producer's mark should be enjoined, as in *Singer v. June Manufacturing Co.*, 163 U. S. 169, 16 Sup. Ct. 1002, 41 L. Ed. 118. In this case, however, neither party marks the biscuit itself, and it would obviously impair the strength and deform the appearance of this very fragile biscuit to do so.

The complainant's claim to be protected in any secondary meaning its goods have acquired can go no further than its injury, and that is only so far as the public buys or is likely to buy the defendant's product supposing that it is the complainant's. The retail dealer and the purchaser of cartons are not misled. Guests in boarding houses and hotels on the American plan take what they are given. It is only a very small part of the public, namely, those who patronize lunch rooms, restaurants, or hotels on the European plan, and who order biscuit which they see on the

counters, or on plates or saucers, supposing they are the complainant's, when they are really the defendant's manufacture. This seems to me an insufficient reason for giving the complainant a monopoly for all time of what apparently is the best size of this ordinary commercial article, unless the defendant and other manufacturers adopt distinguishing marks which either increase the cost of manufacture or deform and weaken the product.

Moreover, I think that the form and size of the biscuit as always made by the complainant are functional, and that imitation of these features is no evidence of unfair competition. The form evidently tends to strengthen a product made out of such fragile material and the size is apparently the best fitted for use as a breakfast food on a saucer. I think the bill should be dismissed." *Shredded Wheat Co. v. Humphrey Cornell Co.*, 250 Fed., 960, 967.

In that case the Court of Appeals entered the following decree:

"First, by relieving the defendants of any injunction in the sale of such biscuits as shall reach the last purchaser in cartons; second, all biscuits reaching the last purchaser outside of their cartons must either bear a letter, cross, or other plain symbol, impressed in their substance, or have fastened upon them a wrapping, tag, or band, stating that they are made by the Ross Food Company; third, the defendant at the end of six months may apply to the District Court to be relieved of the second requirement, upon showing that after a bona fide trial of all possible expedients it cannot comply with that provision, except at an expense which would make impossible any continued competition in the business of selling biscuits outside the cartons with any assurance of reasonable profit."

Andrew Ross testified in this case about the effort of his company to mark or band the biscuit:

"Q. 66. Did the Ross Food Company do anything with regard to that second clause of the modified decree, concerning the marking of the biscuit with a letter, cross, or other plain symbol? If they did, I wish you would relate to me in narrative form what was done and what results or conclusions were reached? A. We experimented as to what might be done to comply with that requirement, although we felt, with all proper respect to the Court, that they had no conception of trade conditions or they would never have made such a decision.

However, we made experiments as to what might be done in the way of marking the biscuit. We tried to make an impression in the top of the biscuit, and we found that frequently it broke the shreds and distorted the biscuit, spoiled it. And when it did not do that, we found that, in the baking, when the biscuit rose, the marking disappeared.

Then we tried making a mark, or making a raised mark in the bottom of the pan, so that the delicate shreds, when they were fed out of the pan, would adjust themselves to that raised portion, so that that might, in the baking, leave a mark. But we found that that used to distort it and it was a very poor mark. We did not find any practical way of complying with that requirement.

Q. 68. Did you apply, at the end of six months, to be relieved of that second requirement as being impossible to carry out? A. No.

Q. 69. You did not apply at all? A. No.

Q. 70. Why was that, Mr. Ross? A. By that time, our capital was exhausted. We had no resources with which to do anything on those matters."

Next, defendant entered the field and challenged plaintiff's pretensions to monopoly. Defendant is the largest manufacturer of breakfast cereals in the country. It is the successor to Kellogg's Toasted Corn Flake Company and operates a factory at Battle Creek, Michigan. Kellogg's line of cereal products, like Kellogg's Corn Flakes, Kellogg's Bran and Kellogg's Pep are well known in the grocery trade and to the public. For years the name "Kellogg's" has been a distinctive household name meaning a particular maker of cereal foods. These foods have been widely advertised and are well known. Approximately a billion and a half cartons are put out each year. Since 1905 defendant has spent \$50,000,000 in advertising its products. The name "Kellogg's" has appeared in every advertisement. From 1912 to 1919 defendant manufactured a shredded biscuit marketed in cartons marked "Kellogg's Toasted Wheat Biscuit". From the Fall of 1921 to the Fall of 1922 defendant manufactured and sold a shredded whole wheat biscuit of small size and pillow-shape. The size was less than two thirds the size of plaintiff's biscuit. In 1927 defendant resumed the manufacture of the small shredded wheat biscuit and still continues to market that biscuit in cartons marked "Kellogg's Shredded Whole Wheat Biscuit". Since 1930 defendant also marketed this small biscuit in cartons marked "Kellogg's Whole Wheat Biscuit".

In 1928 plaintiff sued two of defendant's dealers. After some depositions were taken plaintiff moved no further until the suit was ripe for dismissal for want of prosecution. In 1930 the suit was discontinued by stipulation. In 1932 the present suit was brought.

Neither party sells its biscuit loose or in bulk, but only in cartons. The defendant's carton is in the familiar red and green colors of the old established line

of Kellogg's cereal cartons. The word "Kellogg's" in bold script and printed in red dominates the package. The defendant's cartons are of two sizes. There is a large carton carrying 15 biscuits weighing 12½ ounces. The other Kellogg carton is a two biscuit carton called "individual" and sold for use in the restaurant trade. Plaintiff's cartons are unlike defendant's. They are differently colored and featured by representations of Niagara Falls and of plaintiff's factory near by. Plaintiff has a large carton carrying 12 biscuits weighing 12 ounces and a small carton carrying 2 large biscuits. Plaintiff also has an individual carton carrying 2 biscuits indistinguishable in size from defendant's small biscuits and first put upon the market five years after defendant originated and popularized the small sized biscuit. It should be noted that defendant distinguished its biscuit from plaintiff's by making a different size yet plaintiff wiped out the size distinction by duplicating defendant's small biscuits.

Both parties encouraged the sale of their regular size shredded wheat biscuit to the restaurant, lunch room and hotel trade in individual cartons. Approximately 97½ per cent. of defendant's trade is supplied with biscuits in the large 15 biscuit carton. The remaining 2½ per cent. is divided into two parts: 98 per cent. of this 2½ per cent. receives the biscuits in individual cartons; the remaining 2 per cent. of said 2½ per cent. of defendant's total business or about 1 in every 5,000 biscuits is served apart from a carton yet is distinguishable because of its smaller size.

The marked difference in the cartons of the parties prevents confusion. Defendant's cartons bear no resemblance to plaintiff's and can not be mistaken for them. This is apparent from the following reproductions:

TOP OF PLAINTIFF'S CARTON

203

READY-COOKED, READY-TO-EAT
TO INSURE CRISPNESS, HEAT BEFORE SERVING

READY-COOKED, READY-TO-EAT
TO INSURE CRISPNESS, HEAT BEFORE SERVING

FRONT OF PLAINTIFF'S CARTON

SHREDDED WHEAT

TRADE MARK REG. U. S. PAT. OFF.

COPYRIGHT 1933 BY NATIONAL BISCUIT COMPANY





SHREDDED WHEAT

TRADE MARK REG. U. S. PAT. OFF.

COPYRIGHT 1933 BY NATIONAL BISCUIT COMPANY

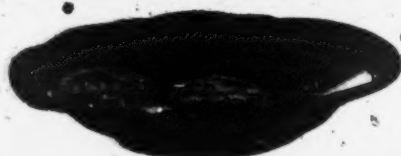
12 BISCUITS

AS MADE SINCE 1893

12 OUNCES

Made of the whole wheat—nothing added, nothing taken away.

100% whole wheat with all its bran, minerals and other vital substances. A nutritious cereal food, ready-cooked, ready-to-eat.



TRADE MARK REG. U. S. PAT. OFF.

It is equally nourishing for breakfast, for lunch, for dinner. Delicious with berries, sliced bananas, or other fruits.

HEAT THE BISCUIT IN OVEN TO INSURE CRISPNESS

HOT SHREDDED WHEAT CEREAL

6 Shredded Wheat Biscuits

3 Cups Boiling Water...Salt

Crumble Shredded Wheat Biscuits. Into boiling water stir crumbled Shredded Wheat. Salt

to taste. Boil gently 5 minutes, stirring occasionally. 6 portions.

Hot Shredded Wheat—Heat Shredded Wheat Biscuit in a hot oven. Serve with hot milk and add cream if desired and salt or sugar to taste.

NATIONAL BISCUIT COMPANY

"Uneda Bakers"

MADE IN U.S.A.

ADDRESS: NEW YORK, N.Y.

SHREDDED WHEAT BAKERIES

NIAGARA FALLS, N. Y.

OAKLAND, CAL.

THE CANADIAN SHREDDED WHEAT COMPANY, LTD.

NIAGARA FALLS, CANADA

THE SHREDDED WHEAT COMPANY, LTD.

WELWYN GARDEN CITY

HERTS, ENGLAND

ALL THE BRAN IN THE WHEAT

BOTTOM OF PLAINTIFF'S CARTON

HANDLE WITH CARE

SHREDDED

SHREDDED WHEAT

TRADE MARK REG. U. S. PAT. OFF.

COPYRIGHT 1933 BY NATIONAL BISCUIT COMPANY

12 BISCUITS

AS MADE SINCE 1893

12 OUNCES

Made of the whole wheat—nothing added, nothing taken away.

100% whole wheat with all its bran, minerals and other vital substances. A nutritious cereal food, ready-cooked, ready-to-eat.



TRADE MARK REG. U. S. PAT. OFF.

It is equally nourishing for breakfast, for lunch, for dinner. Delicious with berries, sliced bananas, or other fruits.

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HOT SHREDDED WHEAT CEREAL

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3 Cups Boiling Water...Salt

Crumble Shredded Wheat Biscuits. Into boiling water stir crumbled Shredded Wheat. Salt

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MADE IN U.S.A.

ADDRESS: NEW YORK, N.Y.

SHREDDED WHEAT BAKERIES

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OAKLAND, CAL.

THE CANADIAN SHREDDED WHEAT COMPANY, LTD.

NIAGARA FALLS, CANADA

THE SHREDDED WHEAT COMPANY, LTD.

WELWYN GARDEN CITY

HERTS, ENGLAND

ALL THE BRAN IN THE WHEAT

BOTTOM OF PLAINTIFF'S CARTON

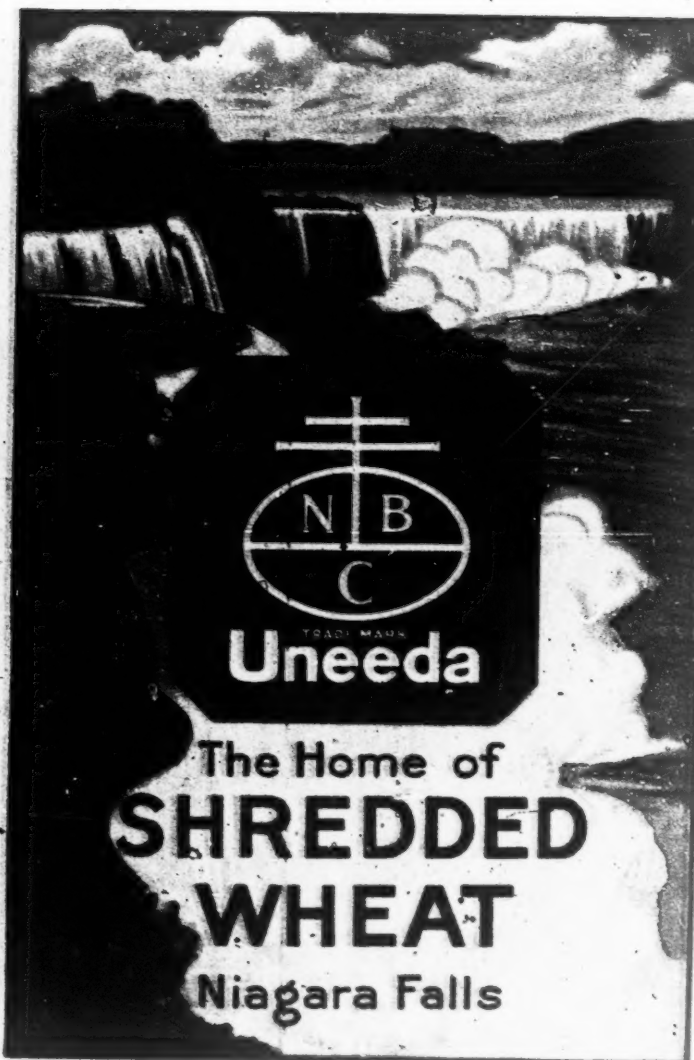
HANDLE WITH CARE

SHREDDED

WHOLE WHEAT

HANDLE WITH CARE

NOTES ON THE BOTTOM



NOTES ON THE HISTORY OF THE



Kellogg's



SHREDDED WHOLE WHEAT **BISCUIT**

6-30-F

MADE IN U. S. A.

Kellogg's

SHREDDED
WHOLE WHEAT
BISCUIT

HELP YOURSELF TO HEALTH





Kellogg's



SHREDDED WHOLE WHEAT **BISCUIT**

6-30-F

MADE IN U. S. A.

Kellogg's

SHREDDED
WHOLE WHEAT
BISCUIT

HELP YOURSELF TO HEALTH

W.K. Kellogg

15
BISCUITS

KELLOGG COMPANY, BATTLE CREEK, MICH.

LONDON, ENGLAND

LONDON, CANADA

SYDNEY, AUSTRALIA

NET WEIGHT 12 ½ OUNCES

(CASE NO. 324)

PR. BY KELLOGG COMPANY

TRADEMARKS REG. U.S. PAT. OFF.

212

"SHREDDED WHOLE WHEAT BISCUIT" CARTON

Kellogg's

SHREDDED WHOLE WHEAT BISCUIT

This delicious, nourishing food is made from entire whole wheat. Contains all the elements necessary for the proper nourishment of the human body. In these biscuits you get all the valuable food elements of rich whole wheat—combined with the laxative properties of bran.

SPECIAL NOTICE

To restore crispness place in oven for a minute or two just before serving. To avoid over-toasting leave the oven door open about two inches.

Kellogg's

SHREDDED WHOLE WHEAT BISCUIT

Are delicious with milk or cream and a special treat with berries, peaches, prunes, bananas, canned pears and other fresh or preserved fruits. To serve, pour hot or cold milk or cream over the biscuit. Add sugar or salt to suit taste—also delicious with honey. The biscuits are especially appetizing when split open, buttered and browned in oven.

SPECIAL NOTICE

To restore crispness place in oven for a minute or two just before serving. To avoid over-toasting leave the oven door open about two inches.

5 Biscuits

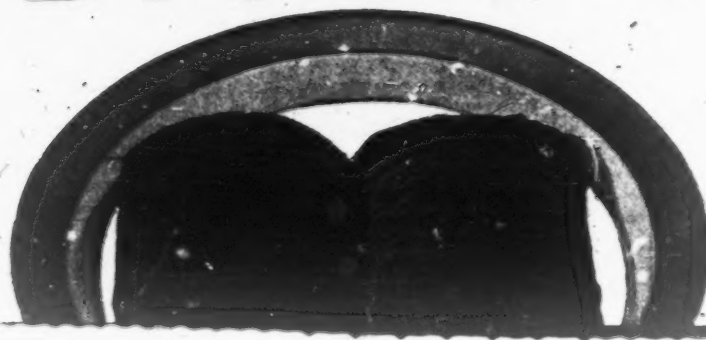
Kellogg's

12½ Ounces

WHOLE WHEAT BISCUIT

Kellogg's

**WHOLE WHEAT
BISCUIT**

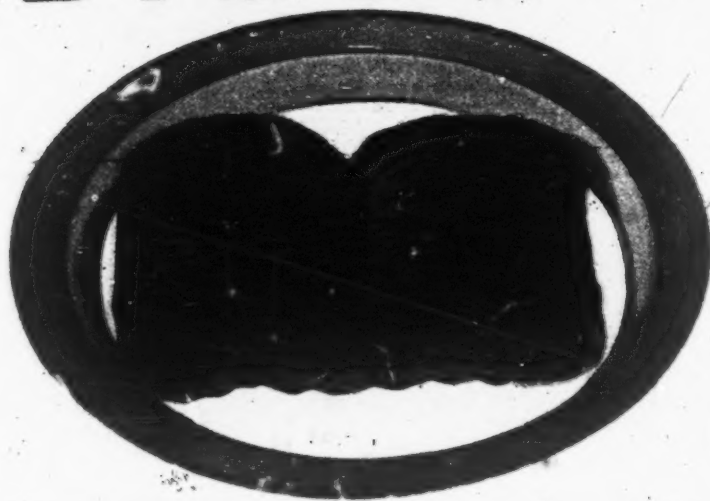


Kellogg

WHOLE WHEAT BISCUIT

Kellogg's

**WHOLE WHEAT
BISCUIT**



15
BISCUITS

12½
OUNCES

MADE BY KELLOGG IN BATTLE CREEK, MICH., U S. A.

1. NAME OF THE PARTY OR PERSON

2. ADDRESS OF THE PARTY OR PERSON

3. DATE OF BIRTH

4. DATE OF DEATH

5. PLACE OF BIRTH

6. PLACE OF DEATH

7. OCCUPATION

8. RELIGION

9. EDUCATION

10. MARRIAGE

11. CHILDREN

12. OTHER INFORMATION

13. SIGNATURE

14. DATE

15. PLACE

16. OTHER INFORMATION

17. SIGNATURE

18. DATE

19. PLACE

20. OTHER INFORMATION

21. SIGNATURE

22. DATE

23. PLACE

24. OTHER INFORMATION

25. SIGNATURE

26. DATE

27. PLACE

28. OTHER INFORMATION

29. SIGNATURE

30. DATE

31. PLACE

32. OTHER INFORMATION

33. SIGNATURE

34. DATE

35. PLACE

36. OTHER INFORMATION

37. SIGNATURE

38. DATE

39. PLACE

40. OTHER INFORMATION

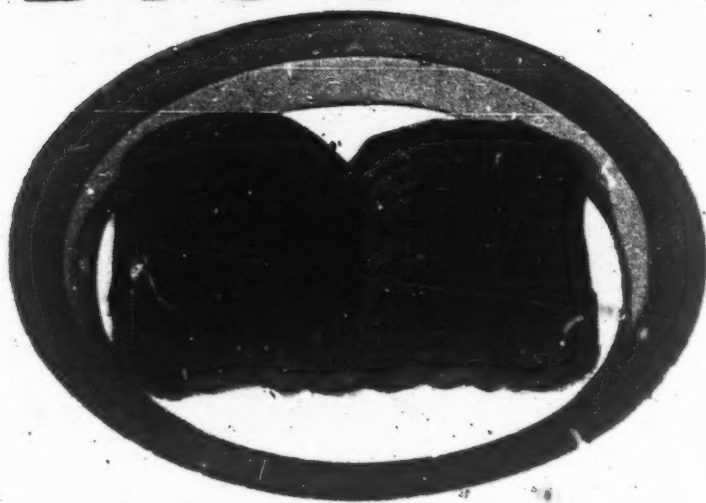
41. SIGNATURE

42. DATE

43. PLACE

44. OTHER INFORMATION

Kellogg's
**WHOLE WHEAT
BISCUIT**



**HOLE
HEAT**

**DOUBLE
TOASTED**

MADE BY KELLOGG COMPANY, BATTLE CREEK, MICH., U. S. A.

BY KELLOGG CO. 1933

TRADE MARKS REG. U. S. PAT. OFF.

PATENT PENDING ON METHOD AND MEANS OF PACKING CONTENTS HEREOF

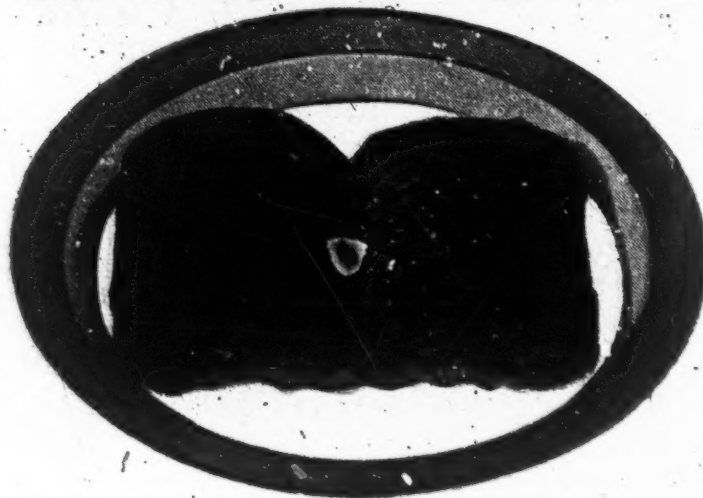
Biscuits

Kellogg's

12½ Ounces

Kellogg's

WHOLE WHEAT BISCUIT



WHOLE
WHEAT

DOUBLE
TOASTED

MADE BY: KELLOGG COMPANY, BATTLE CREEK, MICH., U. S. A.

OPR. BY KELLOGG CO. 1933

TRADE MARKS REG., U. S. PAT. OFF.

PATENT PENDING ON METHOD AND MEANS OF PACKING CONTENTS HEREOF

5 Biscuits

Kellogg's

12½ Ounces

WHOLE WHEAT BISCUIT

6-34-F

Kellogg's **WHOLE WHEAT BISCUIT**

(A SHREDDED WHEAT PRODUCT)

are delicious served with hot or cold milk or cream; and a special treat with berries, peaches, prunes, bananas or other fresh or preserved fruits. Add sugar or salt to suit taste—or sweeten with honey.

Split and toast the biscuits and serve with butter or use instead of short cake with fruits.

These nourishing, easy-to-digest biscuits are excellent for lunch as well as breakfast. Ideal for children's suppers or for a late bed-time snack.

Especially appetizing with hot milk on cold mornings.

KELLOGG COMPANY
BATTLE CREEK, MICHIGAN

Kellogg's **WHOLE WHEAT BISCUIT**

(SHREDDED WHEAT IN ITS
MOST DELICIOUS FORM)

are made of wheat, thoroughly cooked, shredded and toasted. These biscuits are a new convenient size — two just fit the bowl. Toasted on both sides the natural nut-sweet flavor of the wheat is made even better.

KELLOGG'S WHOLE WHEAT BISCUIT contain Vitamin B, the appetite and growth-promoting vitamin. They have an excellent supply of iron, the mineral necessary for red blood and protein for tissue building. The bran is retained so they are an aid to proper elimination.

Biscuits of both parties are sold in some one of the above cartons. Since the bringing of this suit defendant has cut a window in one side of its carton eliminating the illustration of two biscuits in a saucer. The window is covered with cellophane through which the ends of the biscuits may be seen. The 12 or 15 biscuit cartons cover the great bulk of both plaintiff's and defendant's trade. As appears by the above representations the respective cartons of the parties are readily distinguishable so that no confusion can result. The small or individual cartons with the same distinctive markings remove all confusion in the lunch room, restaurant and retail service. By making its biscuit substantially smaller than plaintiff's, and using individual cartons, defendant has met the requirements of the decree of the Circuit Court of Appeals for the Second Circuit in the Ross case. In this case the proof fully confirms the testimony of Andrew Ross that the biscuit itself can not be branded or marked. With each biscuit distinctively marked by carton and by size, there can be no excuse for confusion or deception. Had the proof in this case as to marking been before the Court of Appeals in the Ross case the opinion of Judge Ward would doubtless have been the opinion of the court.

Plaintiff seeks equitable relief not only on the ground of unfair competition but also on the ground of alleged infringement of trade-marks. Plaintiff requests the court to make the following findings:

"Plaintiff is vested with the exclusive right to manufacture and sell to the public in the United States such biscuit."

"Plaintiff is the owner of and vested with the exclusive right in and to the following trade-marks which were duly registered in the United States Patent Office, to wit:

'Shredded Wheat', registered January 15, 1924, No. 178,725, for biscuit and crackers;

'Shredded Wheat', registered May 25, 1926, No. 213,456, for biscuits, crackers and cereal foods;

A picture of a dish with two whole wheat biscuit, registered August 17, 1926, No. 216,593, for biscuit, crackers and cereal foods."

"All of said trade-marks . . . have been used by the plaintiff in connection with the sale of its said biscuit for many years, and have been so associated with plaintiff's product that they have been and are indicative of source of origin in the plaintiff or its predecessor, the said trade-mark 'Shredded Wheat' having been used since the year 1892."

Whether the case is one of trade-mark infringement or of unfair competition or of both is of no vital consequence. The essential wrong in trade-mark infringement and unfair competition is exactly the same. The Supreme Court says:

"In all cases where rights to the exclusive use of a trade mark are invaded, it is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another; and that it is only when this false representation is directly or indirectly made that the party who appeals to a court of equity can have relief. This is the doctrine of all the authorities." *Canal Company v. Clark*, 13 Wall., 311, 322.

And in a later case that court says:

"Courts afford redress or relief upon the ground that a party has a valuable interest in the good-will of his trade or business, and in the trade-marks adopted to maintain and extend it. The essence of the wrong consists in the sale of the

goods of one manufacturer or vendor for those of another. . . . This essential element is the same in trade-mark cases as in cases of unfair competition unaccompanied with trade-mark infringement. In fact, the common law of trade-marks is but a part of the broader law of unfair competition." *Hanover Milling Co. v. Metcalf*, 240 U. S. 403, 412.

In this case plaintiff claims in perpetuity the monopolistic right to the descriptive word "shredded" and a monopolistic right in the shape or form of the biscuit. Any right of plaintiff must be based upon the wrong of defendant. Relief must be based upon confusion or palming off, otherwise relief should be denied. Originally patents covered every phase of plaintiff's business. There were product, process and design patents which secured plaintiff a perfect monopoly of the business. These patents have expired and *the case falls into the class of expired patent cases* and is controlled by the *Singer* case.

In that celebrated case the name "*Singer*" meant two things; it meant the type of machine and it meant the maker. The fundamental patents in the case had expired over twenty years before suit was brought. There was a large volume of testimony to the effect that when people in the trade were asked "What do you understand by a *Singer* Machine" invariably they answered "We understand it to be a machine manufactured by the *Singer* Manufacturing Company". The conduct of the *June* Manufacturing Company, the defendant, was particularly exasperating. It called its machine an "Improved *Singer*". It used "*J. Mfg. Co.*" in imitation of "*S. Mfg. Co.*" on plaintiff's machine. As the serial number on *Singer* machines ran into the millions defendant began with 300,000,000. It also imitated plaintiff's machine in external appearances and even in ornamentation. Yet, because the

patents had expired, the Supreme Court gave to defendant the right to make the Singer Sewing Machine; the right to use the name "Singer"; and the right to make the machines in the form in which the Singer Company had made them. The injunction that issued only went to the extent of requiring the June Company to put its name on its machines. In other words, June was only required to do what the defendant in this case has always done—place the name "Kellogg's" on the packages. The court said:

"It is self evident that on the expiration of a patent the monopoly created by it ceases to exist, and the right to make the thing formerly covered by the patent becomes public property. It is upon this condition that the patent is granted. It follows, as a matter of course, that on the termination of the patent there passes to the public the right to make the machine in the form in which it was constructed during the patent. We may, therefore, dismiss without further comment the complaint, as to the form in which the defendant made his machines. It equally follows from the cessation of the monopoly and the falling of the patented device into the domain of things public, that along with the public ownership of the device there must also necessarily pass to the public the generic designation of the thing which has arisen during the monopoly, in consequence of the designation having been acquiesced in by the owner, either tacitly, by accepting the benefits of the monopoly, or expressly by his having so connected the name with the machine as to lend countenance to the resulting dedication. To say otherwise would be to hold that although the public had acquired the device covered by the patent, yet the owner of the patent or the manufacturer of the patented thing had retained the designated name which was essentially necessary to vest the public with the full enjoyment of that which had become theirs by the disappearance of the monopoly. In other words, that the patentee or manufacturer could take the benefit

and advantage of the patent upon the condition that at its termination the monopoly should cease, and yet when the end was reached disregard the public dedication and practically perpetuate indefinitely an exclusive right". *Singer M'f'g. Co. v. June M'f'g. Co.*, 163 U. S., 169, 185.

In a later case the court said:

" . . . but when the patent expired the exclusive right to manufacture the article expired with it, while the name which described it became, under the facts of this case, necessarily one of description and did not designate the manufacturers. There was no other name for the article, and in order to obtain it a person would have to describe it by the words 'Rahtjen's Composition'. The words thus became public property descriptive of the article, and the right to manufacture it was open to all by the expiration of the English patent." *Holzapfel's Co. v. Rahtjen's Co.*, 183 U. S., 1, 10.

Where the name is the only name by which the article can be described and is the only name by which it was described during the existence of the patent that name becomes public property upon the expiration of the patent. Here the patented biscuit was known as Shredded Wheat or Shredded Wheat Biscuit. Upon the expiration of the patent that name became public property.

Evidence that Shredded Wheat or Shredded Wheat Biscuit has been understood by the public for years to mean a product produced only by the plaintiff does not establish plaintiff's right to that name. Where a secondary meaning is established even to the exclusion of any other meaning, a competitor has the right to use that name provided he clearly distinguishes his goods. So where a man distinguishes his goods he has fulfilled his duty to his competitors and to the public. What normal person desiring plaintiff's biscuit would take

defendant's package and think he was getting plaintiff's package. Or what person seeing defendant's package would think it was plaintiff's package. Such confusion can not be inferred from the circumstances of the case and there is no proof of it.

The testimony of a hundred witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent. Howard Duane, a witness on behalf of plaintiff testified:

"XQ. You saw right away that the biscuit handed to you in this carton was not the biscuit you had been getting? A. Immediately."

XQ. Did you eat it? A. Yes.

XQ. Did you notice anything about the size when you took it out of the carton? A. Yes, the size was shorter than the Shredded Wheat Biscuit.

XQ. You did not think that was any biscuit made by the National Biscuit Company or the Shredded Wheat Company? A. No, I did not. I knew it was not."

Alvin J. Lee, plaintiff's witness, testified:

"XQ. 44. Do you recognize this Kellogg's whole wheat biscuit package as one of the general family of Kellogg packages? Are not the colors the red and green colors of the standard Kellogg package?"

A. Yes, red and green, and it says Kellogg's.

XQ. 45. You would recognize that as one of the family of Kellogg packages, would you not, that whole wheat biscuit package?

A. Well, with the name on it, yes.

XQ. 46. And you have never seen any of the whole wheat packages that did not have the Kellogg name on it in big red letters, have you?

A. Not as I remember.

XQ. 47. Is there any difference in size between the Kellogg's and the National shredded wheat?

A. I am rather inclined to think that the Kellogg's is smaller."

Mrs. Irma Coiliflower, plaintiff's witness, testified:

"XQ. 49. So, when you asked for shredded wheat and got this product, you knew right away that this brand was not the Niagara Falls product?"

A. Why, absolutely.

XQ. 50. You understood right away, as I understand you, that she was giving you a product made by the Kellogg Company. Is that so?

A. Yes."

Mrs. Clara Goodman, plaintiff's witness, testified:

"XQ. 62. I show you this biscuit in Plaintiff's Exhibit No. 6 for identification and I ask you if you recognize any resemblance or any dissimilarity between those two?"

A. No. There is a difference in the biscuits.

XQ. 63. What is that difference?

A. The shredded wheat is a larger biscuit.

XQ. 64. And when Mrs. Huber gave you this package of Kellogg's Shredded Wheat, you knew right away it was not the Niagara Falls package that you were getting?

A. Certainly.

XQ. 65. And you recognized instantly that it was a new shredded wheat package?

A. Yes."

Testimony of this sort could be quoted at great length. Unless there is deception or the probability of it there is no unfair competition. The proof is lacking in both respects. Plaintiff is complaining, not of unfair competition but of effective competition.

In conclusion I am of opinion that defendant has the right to make shredded wheat biscuit, to make the biscuit in a pillow form and to use the name "Shredded Wheat"; and that plaintiff has no trade-mark right in the words "Shredded" and "Shredded Wheat" or in the form of shredded wheat biscuit. Defendant is

guilty of no unfair competition by using the words "Shredded" and "Shredded Wheat" or by making shredded wheat biscuit in the form of a pillow or by displaying on its packages the illustration of its biscuit in a bowl.

This opinion contains a statement of the essential facts and of the law applicable thereto in conformity with Equity Rule 70½.

The bill must be dismissed.

JOHN P. NIELDS,
J.

January 11, 1935.

FINAL DECREE.

(Filed January 23, 1935.)

And now, to-wit, this twenty-third day of January, A. D. 1935, this cause having come on to be heard upon pleadings and proof, and briefs having been filed and argument made by counsel for the respective parties, and the same having been maturely considered by the Court, it is now, upon motion of E. Ennalls Berl, Esquire, solicitor for defendant,

ORDERED, ADJUDGED AND DECREED BY THE COURT that the bill of complaint herein be and the same hereby is dismissed, and that the costs of this cause be taxed against the plaintiff.

(Sgd.) JOHN P. NIELDS,
J.

PETITION FOR APPEAL.

(Filed February 13, 1935.)

TO THE HONORABLE THE JUDGE OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE DISTRICT OF DELA-
WARE:

The above-named plaintiff, National Biscuit Company, conceiving itself aggrieved by the final decree made and entered in this cause on the twenty-third day of January, A. D. 1935, does hereby appeal from said decree to the United States Circuit Court of Appeals for the Third Circuit for the reasons specified in the assignment of errors filed herewith, and prays that this appeal may be allowed and that citation be issued as provided by law directed to the above-named defendant, Kellogg Company, commanding it to appear before the United States Circuit Court of Appeals for the Third Circuit, to do and receive what may appertain to justice to be done in the premises, and that a transcript of the record, proceedings and documents upon which said decree was made, duly authenticated, be sent to the United States Circuit Court of Appeals for the Third Circuit.

(Sgd.) HUGH M. MORRIS,
Solicitor for Plaintiff.

(Sgd.) DRURY W. COOPER,
(Sgd.) CHARLES A. VILAS,
(Sgd.) THOMAS J. BYRNE,
(Sgd.) HENRY J. SAVAGE,
Of Counsel.

ASSIGNMENT OF ERRORS.

(Filed February 13, 1935.)

Now COMES National Biscuit Company, plaintiff in the above-entitled cause, by its solicitor, and presents, with the accompanying petition for appeal from the final decree made and entered herein by this Honorable Court on the twenty-third day of January, A. D. 1935, the following assignment of errors:

(1) That the Court erred in dismissing the bill of complaint.

(2) That the Court erred in failing to find and adjudge defendant guilty of unfair competition in trade with plaintiff.

(3) That the Court erred in failing to grant plaintiff the relief prayed for in and by its said bill of complaint.

(4) That the Court erred in failing to enjoin defendant from further unfair competition in trade with plaintiff.

(5) That the Court erred in failing to adjudge and decree that defendant account to plaintiff for defendant's unfair competition in trade with plaintiff.

(6) That the Court erred in failing to find and hold that plaintiff is the owner of and vested with the exclusive right in and to the trade-mark consisting of the words "Shredded Wheat" for its said whole wheat biscuit, registered in the United States Patent Office on January 15, 1924, No. 178,725, and that defendant has infringed plaintiff's said registered trade-mark.

(7) That the Court erred in failing to find and hold that the plaintiff is the owner of and vested with the

exclusive right in and to the trade-mark consisting of the words "Shredded Wheat" for its said whole wheat biscuit, registered in the United States Patent Office on May 25, 1926, No. 213,456, for biscuit, crackers and cereal foods, and that defendant has infringed plaintiff's said registered trade-mark.

(8) That the Court erred in failing to find and hold that plaintiff is the owner of and vested with the exclusive right in and to the trade-mark comprising picture of a dish containing two of its said whole wheat biscuit registered in the United States Patent Office on August 17, 1926, No. 216,593, for biscuit, crackers and Cereal foods, and that defendant has infringed plaintiff's said registered trade-mark.

(9) That the Court erred in failing to enjoin defendant from further infringement of plaintiff's said registered trade-marks identified in the three next preceding assignments of error.

(10) That the Court erred in failing to adjudge and decree that defendant account to plaintiff for plaintiff's damages and defendant's profits resulting from defendant's infringement of plaintiff's said registered trade-marks.

(11) That the Court erred in failing to find and hold that from the year 1892 until the present time, plaintiff's predecessors and plaintiff have manufactured and sold whole wheat biscuit in the same distinctive shape, structure and appearance (exemplified by Plaintiff's Exhibit 1) without material alteration or change.

(12) That the Court erred in failing to find and hold that the said whole wheat biscuit manufactured by plaintiff's predecessors and plaintiff during all of the said period from 1892 to the present time has been

readily recognized and distinguishable from any other form of food product manufactured or sold in the United States by reason of its said distinctive form and appearance.

(13) That the Court erred in failing to find and hold that the distinctive shape, structure and appearance of plaintiff's said whole wheat biscuit have, through long continued and exclusive use and by reason of extensive sale and advertising, come to indicate and signify the product and biscuit of plaintiff and of plaintiff alone; and that by reason of the uninterrupted use and association therewith for more than forty years of the words or name "Shredded Wheat," said whole wheat biscuit has become universally known to the trade and to the purchasing public as "Shredded Wheat" and the product of plaintiff exclusively.

(14) That the Court erred in failing to find and hold that during all the said period from 1892 to the present time, except for the unauthorized acts of the defendant and of the Ross Food Company, the plaintiff and its predecessors have been the sole manufacturer of whole wheat biscuit of the form, structure and appearance of plaintiff's whole wheat biscuit.

(15) That the Court erred in failing to find and hold that the volume of sales of plaintiff's said whole wheat biscuit of distinctive design and appearance increased continuously from the year 1892 until the year 1928, in which year 2,521,751 cases of said whole wheat biscuit were sold by plaintiff.

(16) That the Court erred in failing to find, adjudge and declare that plaintiff is vested with the exclusive right to manufacture and sell to the public in the United States said whole wheat biscuit of distinctive form, structure and appearance.

(17) That the Court erred in failing to find and hold that the distinctive form, structure and appearance of the plaintiff's said whole wheat biscuit has acquired a secondary meaning and significance as representing only the product of plaintiff.

(18) That the Court erred in failing to find and hold that the words or name "Shredded Wheat" have since the expiration of all patents relating thereto acquired a meaning and significance as indicating only the said whole wheat biscuit of plaintiff and have been accepted by the trade and by the consuming public as designating plaintiff's product exclusively.

(19) That the Court erred in failing to find and hold that defendant manufactures, sells and distributes in interstate commerce a whole wheat biscuit of substantially the same descriptive properties as the said whole wheat biscuit manufactured and sold by plaintiff, in derogation and infringement of plaintiff's property rights in and to said whole wheat biscuit.

(20) That the Court erred in failing to find and hold that each and all of the said registered trade-marks identified in the preceding assignments of error, 6, 7 and 8, have been used by plaintiff in connection with the sale and advertisement of its said whole wheat biscuit for many years and that by reason thereof, said registered trade-marks have become identified with plaintiff's said product, whole wheat biscuit, and have come to be and are now recognized by the trade and by the purchasing public as indicating the source of origin of said whole wheat biscuit in plaintiff; and that the said trade-mark "Shredded Wheat," registration No. 178,725 has been used by plaintiff's predecessors and plaintiff in association with its said whole wheat biscuit continuously since the year 1892.

(21) That the Court erred in failing to find and hold that defendant has employed on cartons and in advertisements in connection with the sale of its said whole wheat biscuit, the name or words "Shredded Wheat," in derogation and infringement of plaintiff's exclusive property rights therein and thereto and in violation of its rights in and to said registered trademark No. 178,725.

(22) That the Court erred in failing to find and hold that defendant employs upon its cartons and in advertising in connection with the sale of its said whole wheat biscuit the representation or reproduction of said biscuit in derogation and infringement of plaintiff's exclusive property rights in and to its said product whole wheat biscuit of distinctive shape, structure and appearance.

(23) That the Court erred in failing to find and hold that the representation or picture of the plaintiff's said whole wheat biscuit of distinctive design and appearance, shown in a saucer or dish, is a true trademark for said whole wheat biscuit and that the plaintiff is vested with the exclusive right therein and thereto.

(24) That the Court erred in failing to find and hold that defendant has employed on cartons containing its said whole wheat biscuit the reproduction or picture of a dish containing two of said whole wheat biscuit in infringement of plaintiff's right in and to its said registered trademark No. 216,593.

(25) That the Court erred in failing to find and hold that defendant has sold and continues to sell its whole wheat biscuit in cartons having cellophane panels or windows devised and designed to expose the ends of said biscuit, and calculated to deceive the prospective purchaser or consumer into the belief that the contents

of said carton is the biscuit manufactured and sold by plaintiff, of distinctive shape, structure and appearance.

(26) That the Court erred in failing to find and hold that the several acts of the defendant were intended to and do, in fact, deceive and mislead the public into the belief that the said biscuit of defendant is the whole wheat biscuit manufactured and sold by plaintiff.

(27) That the Court erred in failing to find and hold that the several acts and practices of defendant were intended to and have enabled its said product whole wheat biscuit to be mistaken for and substituted, sold and passed off as and for the genuine whole wheat biscuit manufactured and sold by plaintiff.

(28) That the Court erred in failing to find and hold that in the year 1922 the defendant commenced the manufacture and sale of a biscuit which it called "Shredded Whole Wheat Biscuit" which exactly resembled the biscuit of plaintiff with the exception of size, and that defendant, upon notice from the plaintiff, ceased to manufacture said biscuit in October, 1922.

(29) That the Court erred in failing to find and hold that both plaintiff's and defendant's whole wheat biscuit reach the ultimate consumer in many instances in restaurants, cafes, hospitals, institutions and homes outside and without the display of the package to the consumer.

(30) That the Court erred in failing to find and hold that the defendant has falsely and continues to falsely represent that the contents of its carton are "A Shredded Wheat Product" and are the "Original" of said product.

(31) That the Court erred in failing to find and hold that the defendant's said biscuit has been passed

off on numerous occasions by storekeepers, restaurant proprietors and others as and for the biscuit of plaintiff.

(32) That the Court erred in failing to find and hold that customers in stores, restaurants, institutions and private homes have received and consumed defendant's biscuit in the mistaken belief that it was the plaintiff's said biscuit.

(33) That the Court erred in finding that for twenty years from 1894 until 1914 the trade-mark of plaintiff was the Goddess Ceres, represented as holding a lighted torch in one hand and a sheaf of wheat in the other.

(34) That the Court erred in finding that the plaintiff and its predecessors made efforts to perpetuate their patent monopoly by the use of trade-marks and the institution of suits against competitors.

(35) That the Court erred in finding that throughout the patents owned by plaintiff and/or by its predecessors the word "Shredded" is used repeatedly and always as descriptive of the product.

(36) That the Court erred in finding as a matter of fact that from 1912 to 1919 defendant manufactured a shredded biscuit marketed in cartons marked "Kellogg's Toasted Wheat Biscuit."

(37) That the Court erred in finding as matters of fact that defendant distinguished its biscuit from plaintiff's by making a different size yet plaintiff wiped out the size distinction by duplicating defendant's small biscuits.

(38) That the Court erred in finding as a matter of fact that approximately 97½ per cent. of defend-

ant's trade is supplied with biscuit in the large 15-biscuit carton; that the remaining $2\frac{1}{2}$ per cent. is divided into two parts: 98 per cent. of this $2\frac{1}{2}$ per cent. receives the biscuits in individual cartons; the remaining 2 per cent. of said $2\frac{1}{2}$ per cent. of defendant's total business or about 1 in every 5000 biscuits is served apart from a carton, yet is distinguishable because of its smaller size.

(39) That the Court erred in holding and concluding as a matter of law that defendant's cartons bear no resemblance to plaintiff's and cannot be mistaken for them.

(40) That the Court erred in holding and concluding that the respective cartons of the parties are readily distinguishable so that no confusion can result.

(41) That the Court erred in its conclusion that with each biscuit distinctively marked by carton and by size there can be no excuse for confusion or deception.

(42) That the Court erred in its conclusion of law that the case falls into the class of expired patent cases and is controlled by the Singer case.

(43) That the Court erred in its conclusion that evidence that "Shredded Wheat" or "Shredded Wheat Biscuit" has been understood by the public for years to mean a product produced only by the plaintiff does not establish plaintiff's right to that name.

(44) That the Court erred in its conclusion of law that where a secondary meaning is established, even to the exclusion of any other meaning, a competitor has the right to use that name provided he clearly distinguishes his goods, and that where a man distinguishes his goods he has fulfilled his duty to his competitors and to the public.

(45) That the Court erred in its finding of fact that the testimony of 100 witnesses from all parts of the country establishes there was no passing off of defendant's biscuit for plaintiff's or deception of the public to any appreciable extent.

(46) That the Court while correctly stating the law to be that unless there is deception or the probability of it, there is no unfair competition, nevertheless erred in finding and holding that the proof is lacking in both respects and that plaintiff is complaining not of unfair competition but of effective competition.

(47) That the Court erred in its conclusion that defendant has the right to make Shredded Wheat Biscuit, to make the biscuit in a pillow form and to use the name Shredded Wheat.

(48) That the Court erred in its conclusion that plaintiff has no trade-mark right in the words "Shredded" and "Shredded Wheat" or in the form of Shredded Wheat Biscuit.

(49) That the Court erred in finding that defendant is guilty of no unfair competition by using the words "Shredded" and "Shredded Wheat."

(50) That the Court erred in finding that defendant is guilty of no unfair competition by making shredded wheat biscuit in the form of a pillow or by displaying on its packages the illustration of its biscuit in a bowl.

WHEREFORE, the plaintiff prays that the decree of the said District Court of the United States for the District of Delaware be reversed and that said Court be instructed to enter a decree reinstating the bill of complaint and granting the relief therein prayed for.

(Sgd.) HUGH M. MORRIS,
Solicitor for Plaintiff.

ORDER ALLOWING APPEAL.

(Filed February 13, 1935.)

AND NOW, to-wit, this thirteenth day of February, A. D. 1935, upon consideration of the foregoing petition for appeal, the assignment of errors having been filed therewith, it is, upon motion of Hugh M. Morris, Esq., solicitor for National Biscuit Company, petitioner,

ORDERED BY THE COURT that the appeal of said petitioner to the United States Circuit Court of Appeals for the Third Circuit from the final decree entered in this cause on the twenty-third day of January, A. D. 1935, be and the same hereby is allowed, and that a transcript of the record, proceedings and documents and the opinion of this Court filed in this cause upon which said decree was made duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Third Circuit; and it is further

ORDERED BY THE COURT that the petitioner give bond according to law in the sum of Five Hundred Dollars (\$500.00) with surety to be approved by the Court.

(Sgd.) JOHN P. NIELDS,

J.

BOND ON APPEAL.

(Filed February 23, 1935.)

KNOW ALL MEN BY THESE PRESENTS, That We, NATIONAL BISCUIT COMPANY, of 449 West 14th Street, New York City, as Principal, and the AMERICAN SURETY COMPANY OF NEW YORK, a corporation organized under the Laws of the State of New York and authorized to do business in the State of Delaware, as Surety, are held and firmly bound unto the above named KELLOGG COMPANY in the sum of Five Hundred

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and 00/100 Dollars (\$500.00) to be paid to the said Kellogg Company, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, representatives, successors and assigns, jointly and severally, firmly by these presents.

SEALED with our seals and dated the 18th day of February, 1935.

WHEREAS, the above named NATIONAL BISCUIT COMPANY has prosecuted an appeal to the United States Circuit Court of Appeals for the Third Circuit to reverse the decree dated the 23rd day of January, 1935, rendered in the above entitled suit, in the District Court of the United States for the District of Delaware.

NOW, THEREFORE, THE CONDITION OF THIS OBLIGATION IS SUCH, That if the above named NATIONAL BISCUIT COMPANY shall prosecute its appeal to effect and answer all costs if it fail to make its plea good, then this Obligation shall be void, otherwise to remain in full force and effect.

NATIONAL BISCUIT COMPANY,

By: (Sgd.) C. S. STILWELL,

Vice-President.

(Seal)

AMERICAN SURETY COMPANY
OF NEW YORK,

By: (Sgd.) CARL B. WEED,

Resident Vice-President.

Attest:

(Sgd.) T. M. FORBYTH,

Resident Assistant Secretary.

(Seal)

(Sgd.) H. FERGALL,

As to Surety.

Countersigned:

By (Sgd.) ALEX R. ABRAHAM,

At Wilmington, Del.,

(Seal)

Registered Resident Agent.

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STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

On the eighteenth day of February in the year 1935, before me personally came C. S. Stilwell, to me known, who being by me duly sworn, did depose and say; that he resides in New York County, that he is the vice-president of National Biscuit Company, the corporation described in and which executed the foregoing instrument; that he knows the seal of said corporation; that the seal affixed to said instrument is such corporate seal; that it was so affixed by order of the board of directors of said corporation, and that he signed his name thereto by like order.

(Sgd.) A. T. BULLOCK,

(Seal) Notary Public.

Notary Public, Queens Co. No. 190.

Registered in Queens Co. No. 203.

Certificate filed in New York Co. No. 92.

Registered in New York Co. No. 6B64.

Commission expires March 30, 1936.

STATE OF NEW YORK, }
COUNTY OF NEW YORK, } ss.:

F. A. ROMAINE, being duly sworn, says: That he is an assistant secretary of the American Surety Company of New York; that said company is a corporation duly created, existing and engaged in business as a surety company under and by virtue of the laws of the State of New York, and has duly complied with all the requirements of the laws of said State applicable to said company, and is duly qualified to act as surety under such laws; that said company has also duly complied with and is duly qualified to act as surety under the Act of Congress of August 13, 1894, entitled "An

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Act relative to recognizances, stipulations, bonds and undertakings and to allow certain corporations to be accepted as surety thereon," as amended; that the within is a true copy of the last statement of the resources and liabilities of said company as rendered pursuant to section 4 of said Act of Congress; that said statement is true and that said American Surety Company of New York is worth more than \$7,500,000 over and above all its debts and liabilities and such exemptions as may be allowed by law.

(Seal)

(Sgd.) F. A. ROMAINE.

Subscribed and sworn before me this twelfth day of September, 1934.

(Sgd.) B. L. REHBERGER,

(Seal)

Notary Public

Notary Public, Kings County.

Kings Co. Clerk's No. 389, Reg. No. 5057./

New York Co. Clerk's No. 183, Reg. No. 5R107

My commission expires March 30, 1935.

February 23, 1935. The within bond is approved

(Sgd.) JOHN P. NIELDS,

CITATION.

(Filed March 2, 1935.)

UNITED STATES OF AMERICA, ss.:

THE PRESIDENT OF THE UNITED STATES,

*To Kellogg Company, a Corporation of the State of
Delaware,***GREETING:**

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Third Circuit in the City of Philadelphia, Commonwealth of Pennsylvania, on the twenty-fifth day of March, A. D. 1935, pursuant to an appeal duly obtained from the final decree of the District Court of the United States for the District of Delaware, signed, filed, and entered on the twenty-third day of January, A. D. 1935, in the cause therein pending wherein National Biscuit Company is plaintiff-appellant, and you are defendant-appellee, and show cause, if any there be, why the final decree rendered against the said appellant should not be corrected and why speedy justice should not be done to the parties in that behalf.

Given under my hand in the City of Wilmington, in the District of Delaware, this twenty-third day of February, A. D. 1935.

(Sgd.) JOHN P. NIELDS,
*United States District Judge, Dis-
trict of Delaware.*

Service of the foregoing citation, with copy, accepted this second day of March, A. D. 1935.

(Sgd.) E. ENNALLS BERL,
Solicitor for Defendant-Appellee.

RECORD OF PROCEEDINGS AT TRIAL.

IN THE DISTRICT COURT OF THE UNITED STATES,
FOR THE DISTRICT OF DELAWARE.

NATIONAL BISCUIT COMPANY,

Plaintiff,

No. 980.

—against—

KELLOGG COMPANY,

Defendant.

IN EQUITY.

Wilmington, Delaware,
Monday, May 22, 1933,
at 10 o'clock A. M.

Before: HON. JOHN P. NIELDS, United States District
Judge.

Appearances: HUGH M. MORRIS, Esq. (Wilmington,
Del.); MESSRS. COOPER, KERR & DUN-
HAM (New York City), by DRURY W.
COOPER, Esq., C. A. VILAS, Esq.,
THOMAS J. BYRNE, Esq., HENRY J.
SAVAGE, Esq. (District of Columbia),
of counsel for plaintiff;

CRICHTON CLARKE, Esq. (New York
City), ARTHUR G. SEIBOLD (Chicago,
Ill.), WARD & GRAY (Wilmington,
Del.), by E. ENNALLS BERL, Esq., of
counsel for defendant.

Mr. Morris made an opening statement on behalf
of the plaintiff and Mr. Clarke made an opening state-
ment on behalf of the defendant, followed by a further
statement by Mr. Cooper on behalf of the plaintiff.

PLAINTIFF'S TESTIMONY AT THE TRIAL.

ELWOOD B. CHAPMAN.

DIRECT EXAMINATION.

THE WITNESS: I reside at Swarthmore, Delaware County, Pennsylvania. I have been connected for nearly thirty years with the Stephen F. Whitman & Sons., Inc., until recently. I am no longer taking an active part in the management. The business of that company is manufacturing chocolates and they are located in Philadelphia. I have an office in Philadelphia at the present time.

(Package of Shredded Wheat received in evidence as Plaintiff's Exhibit 1.)

THE WITNESS: I recognize the article which you take out of Plaintiff's Exhibit 1 as the shredded wheat biscuit which I have been eating for a great many years—so long that I can hardly remember—probably twenty or thirty years. I have been a regular consumer of it and use shredded wheat for breakfast almost to the exclusion of other cereals. During the years that I have been using it the product has not altered in appearance to any notable extent. Apparently it is exactly the same as what I knew originally. I frequently order and consume it in places other than my home. I am connected with the Pennsylvania Park Association, which requires constant travel, so that morning after morning when I am on the road I am ordering in hotels and restaurants.

When I order this product for breakfast I ask for it as "shredded wheat" and never by any other name. I never knew there was any necessity for making any distinction or using any other name for the product only within the last year or two.

During all these years I have linked up the expression "Shredded Wheat" with this product which I have known and eaten for so many years, which I have seen made in the Shredded Wheat plant at Niagara Falls. I have visited the plant and seen the process of manufacture.

With reference to my statement about distinguishing the biscuit. The first incident occurred at the Penn Harris Hotel, April 28, 1931. I was on the Forest and Park trip through the State and I went down to get an early breakfast, and in fact I did not look at the menu—almost every one had "shredded wheat" and I called for an order of "shredded wheat" and possibly a glass of milk along with it, and the girl brought me a package that I had never seen before. This was the first time I had seen anything different from your own. I had seen a package like Plaintiff's Exhibit 1 frequently in my home and I have seen a similar package in which two biscuits are put up for an individual order, but this was something entirely new to me at that time, and I saw it at once and picked it up and looked at the name. I saw it was another name and I thought it was some imitation that they were trying to palm off on me and I took exception to it. I complained at once and asked for the original package. The girl told me that this was the only preparation they had. The biscuits were smaller and not as palatable as your own. I did not know the National Biscuit Company had it then and I addressed this letter to the President of the Shredded Wheat Company, not knowing it was taken over by National Biscuit Company.

The reason I took the trouble to take the top off the box and mail it in is that in my connection at Whitman's I have seen so much imitation of trade-mark products that I had been interested in—probably you all know the Sampler Package, which is admitted to be the best known box of candy in the United States,

and which has been imitated again and again, but not always an exact imitation of the Sampler itself or the use of the name, but in such a way that it could be substituted very easily by the drug stores and others who sell it, and it seemed to me that this was an instance of that kind.

THE COURT: I was prone to ask whether or not in the Sampler box you had any shredded wheat covered with chocolate.

WITNESS: No.

THE WITNESS: There is a product in the candy business which is almost similar to shredded wheat. It is made of very fine strands of sugar. The sugar is hard-boiled and thrown in such a way as to nest it one strand on top of the other—very similar to this biscuit, and is known as spun sugar. It is very close to your own product, that is, the method of manufacture.

THE COURT: Is it a corn sugar?

WITNESS: No, pure cane sugar cooked very high, so that it will harden very quickly and then thrown out into these very fine threads which crystallize and harden almost immediately, so that it packs up one on top of the other, making a little nest.

THE COURT: And you covered that?

WITNESS: That is something that is generally known in the business as spun sugar, but it is very similar to this product.

THE WITNESS: It is used as a container for candy, ices and things of that kind on the table at dinner. It is not covered with chocolate.

After the occurrence at the Penn Harris Hotel I wrote to The Shredded Wheat Company. There were other similar occurrences in varying ways, but on that

particular occasion when I protested and asked for shredded wheat I was told that was all they had.

THE COURT: It was served to you with a saucer and cream in a container like this?

WITNESS: Yes. Shall I give the instances which are listed here?

THE COURT: I suggested to the witness a Kellogg container.

THE WITNESS: I was impressed with this, because it was the first time I had ever seen anything that was purported to be a substitute for shredded wheat, and naturally I was on the outlook for it. The same thing occurred the following morning at the same hotel and I went through the same experience trying to get shredded wheat, but I was offered this and could not get anything else.

On May 1st at the Fort Pitt Hotel in Pittsburgh; June 27th at the Nittany Lion, State College, the surrounding circumstances were different in each case, but in some instances they were served outside the package. There was a somewhat different taste and a different size and shape which led me immediately to ask whether this was shredded wheat. In one or two instances I was told it was and I had to ask if it was the original shredded wheat. In a few instances I went to the trouble of going to the proprietor of the hotel.

At the State College instance I felt particularly aggrieved because we were holding a convention there and had practically filled up the hotel and gotten acquainted with the proprietor and I went to him and asked him why they should serve anything of that kind when it was noted on the menu as shredded wheat.

I have a little memorandum here and as I said, in attending a meeting of the Forestry Association I had three instances inside of three days.

At the State College the waiters brought me the Kellogg product although I ordered distinctly shredded wheat. I went to the length of taking this up with the proprietor of the hotel and he assured me that they carried both sizes and went so far as to send to the kitchen for a package of our own product, referring to the shredded wheat. Notwithstanding this the waiters had insisted that Kellogg's was shredded wheat and it was the only thing they had. I only got what I wanted by going to the proprietor of the hotel for it.

I have so many engagements in traveling around as I do that I have carried a diary for the purpose of noting the various engagements that I have had and the places where I stopped. I have a memorandum here of these as I have noted them and then wrote to the Shredded Wheat Company on my return to my office. I took that from the notations which I had made in my memorandum book.

The facts that I have narrated are true, but I did not finish that list. In addition to that there was a Fenway Tea Room at the State College and a day or so later the Hersey Inn; July 1st, the Algonquin Hotel at Cumberland; July 8th the Andrew Jackson, Knoxville, and July 14th, the Green Brier Hotel at White Sulphur Springs, and that is one place where I raised a row and I do not often do it, but I ran a restaurant myself a great many years, and here they charged you up to \$25 a day and serving something that was not listed on the menu in substitution for what a guest asked for. I asked for Shredded Wheat and they did not bring it to me. It was a smaller biscuit and a little different in appearance and I had to investigate to find out whether it was Shredded Wheat. It was not brought to me in a package, but in a dish.

Here is the menu that I brought away with me from the Fenway Tea Room and my own mark of

Shredded Wheat, ten cents, is shown by the blue pencil mark around the word "Shredded Wheat."

(Menu card in evidence in connection with testimony of witness—Marked Plaintiff's Exhibit 238.)

WITNESS: My experience as to the method in which Shredded Wheat or this other product that I have mentioned is served in restaurants, cafes and hotels varied in these instances which I stated here. In some it was handed to me in the original package, and in others it was served separately, just on the saucer. There, of course, it required investigation to identify it, but I did in each instance which I stated to you.

During my traveling about in various places Shredded Wheat frequently was served without the production of the package. In the less expensive places they are more apt to hand one the carton, but the higher priced places they often hand it separately. Sometimes both biscuits and sometimes only a single one.

WITNESS: I have no connection with National Biscuit Company nor do I know any one connected with that company, or the Shredded Wheat Company, and I have no interest in the outcome of this litigation.

CROSS-EXAMINATION.

THE WITNESS: I still continue to ask for Shredded Wheat.

XQ. 49. And will you go on for the rest of your life asking for Shredded Wheat?

THE COURT: That is all in the realm of speculation.

WITNESS: On each occasion when the waiter told me Shredded Wheat was made by the Kellogg Company I specified Shredded Wheat. I do not know whether I said original, but I asked for Shredded Wheat particu-

larly and told him that this was not what I was trying to order—told him it was not Shredded Wheat at all.

XQ. 52. Is that strictly true? Is it not Shredded Wheat that is made by the Kellogg Company?

A. You are asking a question which requires rather a lengthy answer. I would not—

XQ. 53. Let me split it up.

THE COURT: The witness may give as lengthy an answer as he chooses within reasonable limits.

WITNESS: When you speak of Shredded Wheat it does not seem to me that that is technically a descriptive name of that product.

MR. CLARKE: I object to that.

WITNESS: To me it is not a technical descriptive name, because similar processes in various ways as I have already described in the candy business, how we built up out of a sugar a product almost like that which is called spun sugar.

THE COURT: Is this answer responsive to the question?

MR. CLARKE: I do not think so.

(XQ. 52 was thereupon repeated as recorded.)

MR. CLARKE: Is your answer no to that?

MR. VILAS: Give the witness an opportunity.

THE COURT: The question is in the inflection. Frame the question so that it will appear to be one when read.

MR. CLARKE: I will repeat it.

By MR. CLARKE:

XQ. 54. You say that this product which was handed to you was not shredded wheat made by the Kellogg Company of Battle Creek, Michigan?

A. To my mind Shredded Wheat was directed to one particular problem.

XQ. 55. Is it not capable of a yes or no answer?

I would say no if I might be given that little further chance to explain what my thought of shredded was. The reason for saying no, is this: In replying no to the question it is because as I started to explain, it is my thought shredded is not a technical definition of that. I have explained the one instance which I have already recited, when iron is pulled out into fine threads, it is called drawing, and in our own business again, chocolate is made into very slender cylinders, and it is called pressing there, and I do not know of any technical description of such a thing as that as being shredding.

In the Kellogg Company carton that was handed to me there was a biscuit somewhat similar in appearance to what I had been using, which I presume was made of wheat. It was not shredded under the definition of shredded that I have just attempted to give you, which is my own definition. You might call it by any of those names that I have stated that were ordinarily used, such as wire is known as drawn. If you wanted to find some name to technically describe what you attempted to do in making the fine shreds, you might have called it——

THE COURT: There is nothing fragile about the wire?

WITNESS: No. You could have called it from the sugar spun wheat or pressed wheat if it is pressed out. I do not know the process except in a general way.

XQ. 64. So that what you meant to tell these waiters when you said this was not shredded wheat was that it was not spun wheat or drawn wheat; is that what you mean?

MR. VILAS: I object to that question.

THE COURT: Overruled.

MR. VILAS: Exception.

A. It was somewhat similar to any of those processes. Such a thought did not come up at that time. I never told the waiters that it did not resemble drawn wheat or any of those things.

WITNESS: In several instances the waiter told me it was shredded wheat. In the dispute between myself and the waiters I meant to tell them that it was not the product which I had been asking for and eating for years. It was something that was made by Kellogg.

At first I thought it was an imitation. It looked like other imitations; looked like the original product, but was not. It was the product made by the Kellogg Company at Battle Creek, Michigan. At any rate, I knew right away it was not the product I had been getting for thirty years. When it was served outside of the plate I had to investigate to ascertain for sure just what they were trying to serve me. These later investigations were the result of the cumulative effect of the constant impositions, morning after morning, that made this effect upon me. On each of these occasions I knew it was a different cereal served to me in a plate. I inferred it was the Kellogg product because I remember the original carton that had been handed to me in the Penn Harris Hotel.

In the two or three instances where I went to the hotel proprietor I told him that I had been accustomed to asking for Shredded Wheat for years, and here was something that had been brought to me which was something that I had not been getting. I still had Shredded Wheat. This was particularly noticeable at this time in 1931 when I was traveling a great deal through the parks in western Pennsylvania and Virginia and there seemed to be a circle that had been well

covered by the Kellogg product. In other cases I had not noticed it, like nearby in my own home.

XQ. 78. Even if the Niagara Falls people, that is the plaintiff here, would put the word original on their package, original shredded wheat, would you then call it original shredded wheat?

MR. VILAS: I object to that question as hypothetical and speculative.

THE COURT: This is cross-examination. The objection is overruled.

A. Ought I to be required to suggest—

MR. CLARKE: That is not my question.

(Last question repeated as recorded.)

A. In my own business I would not expect to be original sampler on the top of the package.

XQ. 79. I said if they called it original shredded wheat, would you not call it original shredded wheat when you ordered it?

A. Not unless I noticed it for some continuous length of time that there was a change being made in the package. Do you not realize that for so many years I have been looking at this thing continuously that you do not stop to think that something is being palmed off on you.

THE COURT: Do you desire to supplement the answer?

WITNESS: No, I do not mean to make it too lengthy, but in picking up a package I would not scrutinize it every time unless it was noticeably different.

THE WITNESS: The Stephen F. Whitman & Son, Inc., make a spun sugar, not sponge chocolate. It is not a shredded product—it looks almost like either of the products here, a mass of little shreds, like spun

glass. This is not copyrighted or trade-marked. I merely cited that as something that is being classified as spun.

I knew the shredded wheat process was patented originally, but I understood that that has expired. My thought was that the way the other product was being marketed was under the heading of unfair competition and not infringing of patents.

WITNESS: I did not think that the little square package was the Niagara Falls package that I had been getting for years.

My own product was not copyrighted or trade-marked—it was something that had been made for years and years. Our sampler package has been copied again and again and at one time we had twenty-three imitations of various kinds. We never had to sue for they always stopped fortunately before we progressed very far. We took it up with counsel immediately; twice I think we got almost under way, but it never came to issue. Some imitations were deceptive and some only partially so.

XQ. 93. What was your objection to the ones that were not deceptive?

A. There it was a case of unfair competition by substitution on the part of the retailer. It gave the retailer such a splendid opportunity—

THE COURT: Are we getting away from the issue?

MR. CLARKE: I just wanted to see—

THE COURT: Have you seen?

MR. CLARKE: Yes. I wanted to see what it was in the witness's business that made him see these things.

WITNESS: And as a consumer, too.

WITNESS: I wrote to the complainant about receiving the Kellogg package at the very first instances as I stated in my original testimony. Here is a copy which I addressed to the president of the Shredded Wheat Company.

"May 4th, 1931.

"To the President,
Shredded Wheat Company,
Niagara Falls, N. Y.

Dear Sir:

For untold years I have been a regular consumer of your product. On the morning of April 28th, in the breakfast room of the Penn Harris Hotel, Harrisburg, I called for shredded wheat. The girl brought me a box from which the accompanying top was taken. I complained at once and asked for the original package; she told me that this was the only preparation that they had. The biscuits were much smaller and were not as palatable as your own.

"On the morning of the 29th this transaction was repeated at the Penn Harris, and to my surprise a few days later at the Fort Pitt Hotel in Pittsburgh, too.

"This is clearly illegal, as you are doubtless already aware. Under court decision no dealer has any right to sell a 'substitute' without stating plainly that he does not have the article asked for and is offering the other in its place.

"I am writing you at this length because as the owner of proprietary articles, among them the Whitman Sampler, I am greatly interested in putting a stop to this pernicious practice. If a considerable number of hotels are profiting by substituting this smaller and probably cheaper biscuit it

seems to me that it may have a very serious effect upon the volume of your own sales.

“Very truly yours,

(Signed) ELLWOOD B. CHAPMAN.”

I received a reply acknowledging my letter—there was very little correspondence. Most of that developed later.

WITNESS: This Whitman Sampler candy is the one I referred to on direct examination as having a great many copies or imitations, but no case was ever filed. The more serious ones never got to issue in court. They have been repeatedly in the hands of counsel though.

I understand the words “shredded wheat” to mean a biscuit made by National Biscuit Company for twenty or thirty years because that company succeeded to the business of the Shredded Wheat Company.

WITNESS: The waiters said several times that this was shredded wheat. You know how much waiters generally know about the trade-marks and copyrights and names, scarcely anything.

In one or two instances where I could not get any other I consumed the Kellogg biscuit, but if you will refer to the correspondence there is some instances in which I succeeded in getting what I wanted. I cannot remember each individual instance.

Last year was the first time it came to my knowledge that there was any necessity of saying anything more than just shredded wheat. The first time it came to my knowledge was the date mentioned in that first letter.

I always associated Niagara or Niagara Falls with the plaintiff's product because I have seen it so often on the carton and on my visits to the factory itself, I naturally would be in association with it.

EARL T. OAKES.**DIRECT EXAMINATION.**

THE WITNESS: I reside at Douglaston, Long Island. I am connected with National Biscuit Company, New York, and have been with that company since May, 1919. I was educated at Columbia University and graduated with degrees of Master of Arts and Doctor of Philosophy in Chemistry. I have been chief chemist of National Biscuit Company since October, 1932. From February, 1929, to October, 1932, I was production manager of the Shredded Wheat Bakeries. Prior to the acquisition of Shredded Wheat Company by National Biscuit Company I had to do with production matters of other products of National Biscuit Company in the New York Bakeries, where at that time we did about 45 per cent. of our entire business and my connection was with the general production, raw materials, processing and packaging of them throughout the plants. When I was production manager of Shredded Wheat Bakeries all my time was spent at the various factories in Niagara Falls, both on the Canadian and American side; Oakland, California, and England.

I am familiar with the machinery by which shredded wheat is produced. The purchase and price paid for raw materials that go into the shredded wheat product has not been under my supervision, but the material itself, the quality and so on has been under my supervision.

I define the kind of wheat we want, when we want it and how much we want and after delivery the wheat comes under my supervision. The wheat arrives in box cars with an inner door and it is boarded up. The cars roll up to the elevators ready to unload and the elevators at Niagara Falls have a capacity of three-quarters of a million bushels. Great care is taken in the selection of a particular grade or kind. As to the

quality, it is all graded at Niagara Falls by the Corn Exchange of Buffalo; the United States inspector passes on referee work on that. We use a No. 1 white winter wheat, which usually comes from New York State; some from Michigan, Ohio and Indiana. Those are about the only places that it is grown. The reason for this selection is based upon experience as to its adaptability for this particular purpose. We maintain a Wheat Research at our Toledo Mills, and there we have financed three State colleges in the development of a higher type of white wheat for this purpose and we are getting results from it. We have isolated a type that is supremely good, but we have not got enough of it to go into the large scale manufacture of it.

We do use a small percentage of Durum wheat, to get certain results in our production; in places where we cannot get Durum wheat, we do without it. On the West Coast we use the West Coast wheat. In England we use Australian wheat. In Canada we use a local Ontario Province wheat. We do not use the red wheats and the darker heavier wheats of that type.

(Set of twenty-four photographs illustrating plaintiff's apparatus and process received and marked "Plaintiff's Exhibit A for Identification.")

THE WITNESS: The first photograph No. 1 is merely an outside view of the plant itself, showing a sign over the main entrance door—"The Home of Shredded Wheat." So far as I know this sign has been above the door since February, 1929.

MR. COOPER: I may say for the Court, that the principal witness whose testimony was taken on deposition who was connected with the Shredded Wheat Company, has told about the origin of that sign, two or three decades ago, I believe.

THE WITNESS: Photograph No. 2 shows the wheat tanks as they are at Niagara Falls. That is the standard type tank for storing wheat. Each tank holds about 20,000 bushels. The total capacity is around three-quarter million bushels. The wheat is dumped from the box car into the foot of the elevator, and carried up to the top of this place. We have a carload of wheat at a time, and it is transferred to a particular bin. From that point it is transferred to the cleaning room in the factory; and photograph No. 3 shows the so-called receiving and milling separator. The receiving separator has screens large enough to let the wheat through, and screen off the larger particles. The milling separator has smaller screens which screens out the finer particles.

No. 4 shows the cleaning machine, which is known as a Carter disk machine. The stream of wheat passes on a series of discs, with pockets in the face of each disc. These pockets are large enough for a grain of wheat, but too small for a grain of oats; and as the disc turns over, it carries the wheat over on the opposite side, and drops it away from the oats. It is picking out a kernel of wheat from the oats; and the photograph No. 5 shows the stoning machines, which are shakers, and they shake the stones out (the stones being heavier, you get a different specific gravity from the wheat), and separate the stones from the wheat. The stones would be in small particles of the same size as the wheat; everything else would have been screened out before. Machines similar to the oat machines separate the cockle seeds apart from the wheat, except here the pockets are just large enough for the round cockle seeds to get into the pocket, but too small for a grain of wheat.

Photograph No. 6 shows the character of the cleaned wheat after it has been through this cleaning process.

Photograph No. 7 shows the cooking equipment after the wheat is cleaned. It is transferred to a bin above the cookers, and there automatically weighed in lots, as charges for the cookers. The cookers are cylindrical iron tanks with a rotating perforated drum inside. The wheat is loaded into the perforated drum. The water run in there is in excess of the wheat, so that the wheat is all covered up with water—the cooker is enclosed. The whole grain of wheat is cooked. Before the wheat is gotten into this cooker it has been perfectly cleaned. The cooker is then closed with its wheat in water. The drum containing the wheat is rotated and the steam turned on to cook it. The same water is used for the cooking of this wheat as the drinking supply to Niagara Falls or for our other sources. The wheat is cooked or boiled until such time as all of the starch is completely gelatinized; that is, each tiny starch cell is ruptured. Each cell of starch in the grain of wheat originally is surrounded by a tough, more or less impervious membrane, which is ruptured and broken, exploded, as it were, in the cooking; but the kernel itself maintains its identity and is not mushy; it is firm and unbroken. Cutting the grain of wheat after it is cooked shows no white starchy portion such as you get in the raw uncooked.

After the cooking is completed, the cooker is opened and the wheat pours out into the hopper.

The hopper is on the same floor as the cooker itself, and the cooking, of course, results in a wheat which has about 50 per cent. of water. Originally we had around 13 per cent., and after it is cooked, it has almost 50 per cent. of water, and is swollen to about twice its original size. This Photograph No. 9 shows the relative size of the kernels of uncooked and cooked wheat. The cooked being on the right. The large kernels from the hopper into which the cooker discharges the wheat is dropped through cooling towers, because it is hot, hav-

ing been completely drained of the cooking water, and that surface moisture is taken out, and the wheat cooled by dropping it through these towers, which have a screen inside, and these luvres outside, so that the wheat drops through a wall about one inch thick, down the eighteen or twenty feet from the cooker to the floor below. Air is pulled through the luvres in through the blanket of wheat or sheet of wheat, and that cools the wheat and takes the excess moisture from the outside. The wheat comes from the cooker at boiling temperature.

Different wheats and different grades of wheat must be handled a little bit differently. It is impossible to get a pure strain of wheat commercially. If the farmer sows a high grade of wheat, or seed, it is only a year or two until it is contaminated with a number of other varieties. A red wheat will vary like that, and will cook much faster than the white, and depending upon the proportions of these different wheats, we must vary our cooking temperature and pressure, to get a wheat which is not mushy, and at the same time is completely cooked. Those cooling towers then discharge into tanks shown in the photograph.

They are luvres. They are slots really like this (indicating), and the wheat passes down through at the end side, and the air is drawn through these slots, and through the sheet of wheat and through the screen back of this. Those tanks into which the cooling tower discharges, hold about 200 bushels of cooked wheat. The wheat is held in these curing tanks for a period of up to 20 hours, and then it is dropped directly into another series of tanks, exactly the same as these, and held for another period of 14 or 16 hours. The dropping from one set to the other, serves to stir it up without any mechanical handling of it, and from here the wheat is conveyed to the shredding machine itself. The conveyor is a belt conveyor; the wheat is dropped onto

The belt and that belt carries it over to the hopper, above the shredding machine. Above this belt, as the wheat comes to the shredding machine, it is spread out in a thin layer, and the electric magnet is set there to take off any magnetizable material that may have found its way into the concern at all. That would be pieces of metal that might come from the pipes or tanks or something. The shredding machine itself consists of a series of rolls mounted tandem, 29 sets of these rolls are together, making the machine around 60 feet long. The wheat from the hopper is conveyed by a scroll conveyor the entire length of the machine. On each set of rolls there is a down spout from this scroll conveyor into the tiny hopper above the rolls themselves.

Twenty-nine sets of rolls. There is one smooth and one grooved roll on all of this set. We only operate 24 or 25 or 26 rolls at one time, so that we have from 3 to 5 idle rolls at all times; so that if anything goes wrong with one set of rolls, they can be cut off, and another set cut in, without stopping the machine. Each set of rolls is driven by a wooden clutch pin; so that if, from any source at all, the foreign material, sensibly tougher than a grain of wheat, gets into that set of rolls, it has too heavy a load for the wooden clutch pin to carry, and the pin breaks, and the roll stops, and is cleaned out and a new peg put in, and started up again. Each of these rolls are of the same size.

They are 4 inches wide and 4 inches in diameter, and they are driven from the one gear so that the periphery of the two is traveling at the same rate of speed. In other words, there is no slipping of one by the other, and consequently no tearing of the wheat as it goes through. It is a smooth rolling process from start to finish.

The rolls are made of a very hard tool steel. They are pressed up against each other, with a pressure of several thousand pounds. In order to make a clean-

cut of the wheat into the shred that we get from it, in fact, they are pressed so tightly that in time the grooved roll wears into the smooth roll, and they have to be either redressed, or new rolls put in.

The depth of the groove runs from $1/18$ thousandth of an inch to $1/24$ thousandths of an inch. They are 18,000, 20,000, 22,000 and 24,000ths of an inch; the reason for that being that in order to maintain the weight of the finished biscuit, if we have 25 rolls on the machine, operating one of them more or less will make the difference of 4 per cent. in our weight, which is too great a variation; and by having the different sized grooves we can make a finer adjustment of the weight in the finished biscuit; and also different weather conditions cause the wheat to shred differently, and we may have to put on more heavier rolls, or more lighter rolls to get the biscuit.

Each of these sets of rolls then is rolling out its shreds of wheat, and to accumulate them along the 60 feet of the machine, there is a conveyor that runs completely around the machine, and it picks up the wheat from the first pair of rolls. The second piles on top of that, and the third, and so on, until when we get to the other end, we have 24, 25 or 26 layers, piled one on top of the other; and this conveyor is practically filled to the top.

Photograph No. 13 shows the conveyor chain with the shredded wheat dropping on it. This roll is taken out to get the picture. This chain is made up of individual links. The links are separated by a narrow space all the way through. There are as many layers of this shredded matter on top of one another as we have rolls operating; in other words, about 24, 25 or 26; each set of rolls put on its set of wheat.

No. 14—from the fogginess of these strips looks as if the belt was running—shows the interior rolls laying their shreds on to the chain. This accumulator

chain carries the shreds up to the end of the machine; but it is to my knowledge the only type of machine employing in the biscuit manufacture a suction for panning the biscuits from the machine on to the pan, on which they are baked. The accumulator chain runs up to the end, as far as here, and then turns back to go to the other end, to come back over again. Between each of these links that I speak of, a lower so-called cutter chain operates on a shorter cycle and the knives from that coming up through between the links of the accumulator chain; these are not possibly to be spoken of as knives, because they have a flat surface of about $1/8$ of an inch or $1/16$ of an inch or 1.32 of an inch, so that they are not sharp.

Above the accumulator chain is a longer so-called panner chain, which operates—these are all numbered, so that we can do this afterwards—so that we have some long accumulator conveyor chain with links with slots in them. The knives on the links from the panner chain above meet those from the cutter coming through from below, and press together, to make the division in this long line of shreds. Then the cutter chain turns back away from those. The panner chain carries on above; each link of the panner chain carries a screen directly over the biscuit, and the hollow chamber above that, the suction operating through the hollow chamber sucks the biscuit up against the screen. The panner chain continues on over the pan itself carrying the biscuit.

Photograph 17 shows the biscuits as they are carried directly over the pan itself, and the suction is knocked off, and this line of biscuits dropped on. That gives a roll of biscuits along the side of the pan. Each pan as it opens, carries four of these rows of biscuits dropped here, and the pan indexed ahead, and another line dropped on.

The cutting operation results in the formation of the biscuit, which is as long as the trough is wide. If you give me about four biscuits, I think I can explain that accurately. Now, instead of the biscuits being cut—this is the end of the accumulator chain, where these 34 piles of shreds have been cut, and this is all one mass, and the knife from below comes between the dot and the accumulator chain, and the knife above comes down over that. The two meet, and keep straight on. At the same time, another set of knives come behind them, so that these are cut off. They are not in fact cut off; they are pinched off, so that there is a salvage edge and it makes possible the formation of the biscuit of this kind. Is that clear? From the panning, the pans are conveyed around to the oven. The oven is the so-called reel or ferris wheel type of oven, which consists of a central shaft, from which the spider operates from the central shaft, much the same as the Ferris wheel operates with the buckets suspended from it. From each of these spiders, a shelf runs across; and no matter where this is turned it is always level as the shelf goes around.

Photograph 18 shows two biscuits loaded on to the shelf. Photograph 19 shows a close-up view of the biscuits themselves. You will notice there that they are much wider than the finished biscuit is. After the biscuits are baked, they have shrunk in width and piled up in height. They are thicker but narrower.

Now, as the wheat goes to the cooker, as I said, it has about 12 per cent. to 14 per cent. of moisture. As it comes from the cooker, it has around 50 per cent. of water. It loses a per cent. or two, in traveling from the cooker to the shredder; so that it goes to the oven a little under 50 per cent. of water. It comes from the oven with about half of that water baked out. The shell is thoroughly baked and browned; but the inside is still wet, and must be evaporated. The temperature

in the oven is about 540 degrees and the time about 20 minutes. From the oven the pans are placed in racks.

THE WIRMAN: The biscuits are still on the pans and taken directly off of the shelf and into the rack. As they are baked and the pan of baked biscuit is removed from the oven shelf a pan of fresh biscuit is put in its place, so that the oven is always full, except for the pan being removed. Still no hand touching the biscuit; they are still on the pans. From the oven in these racks they are shoved into the drying tunnel and conveyed the length of the drying tunnel. This photograph shows them coming out of the drying tunnel. As they come from there, they are bone dry. The moisture has all been evaporated from them.

They are there about an hour, and at a temperature around 300 degrees. Then they are run over to the packing table and the pans from those racks are fed into the packing table. This is Photograph 22.

Photograph 21 was the evaporator, and Photograph 20 was the coming out of the oven. The packing table takes the pan of biscuits and conveys it the length of the table with girls sitting on either side, and as these pans pass between the rows of girls, they reach in there and pick the biscuits out and put them into the carton. The carton is packed and placed on the conveyor running along the middle of the table, and above the pans.

There is a certain continuity of progression in this. It is modern mass production. Those all travel through in a straight line, as I have narrated it. There is no piece work if you are referring to that. The biscuits are taken off as fast as they come in. It is all timed in together with the work. There are a few spots where it can accumulate. For instance, when the racks are pulled out of the evaporators, they are apt to stand around long enough for the biscuits and pans to cool

off, so that there will be no burning or anything of that sort; and if anything happens there at the packing table, they can accumulate, and the packing can go on later. That is an accident. It is all intended to be one cycle. Then these packed cartons shown in Photograph 23 are conveyed into the so-called sealing machines where the flaps are folded in, glued, and a ribbon of paper placed along the gap between the two folds of the ends of the carton.

Photograph 24 merely shows it made into a biscuit.

As I recall it there are about 200 grains of wheat in one of these biscuits. As to any wastage of material, if you will refer to Photograph No. 19, you will see that there is a different spacing between these rows of biscuits as they are dropped on the pan. This upper pan or chain knife sometimes gets a little bit of wheat jammed on the knife so that when it cuts another biscuit it is liable to tack onto that knife and when it drops it may flip up on another biscuit or the pan may be fed through with a bend on the end, which causes it to turn one way or the other; in other words, there are a number of different causes for one biscuit dropping on top of the other. That is a miscarriage and we have an operator inspecting each pan as it goes by. It is impossible as these pans travel by to adjust the biscuit; in fact, if you have the pan still where you can work on it you can scarcely touch these biscuits, they are so frail, without destroying them in the baking.

We pick these biscuits off the pan and put them into a receptacle and take that receptacle back to the shredder and feed it through a set of rolls which are maintained for the purpose of feeding the shreds back through. Any set of rolls can be used, but you have to take this down-spout off in order to feed them in. In every machine set up with 29 pairs of rolls there is one at least which is so arranged that the material that

has been spoiled in transit, so to speak, is put back through that particular set; the down-spout is hinged so that it can be folded up and the rolls used for re-shredding. Day in and day out there is a substantial amount that is thus retreated. According to my experience in many ways it makes a better biscuit.

Referring to the cutting operation, whereby the trough-full of material is severed to form the biscuit, it is not necessary to have cutters that will form the particular shape of biscuit that is here in court.

Q. 67. How much variation in the form of biscuit can you make at that zone of the operation without otherwise changing the machine than merely substituting one form of cutter for another?

A. I do not know how many different kinds you can make. You can make several different kinds, as many as you can think of, I should say.

WITNESS: We have caused a variety of different shapes of biscuit to be made by merely changing the form of the cutting mechanism at the zone pointed out on the photographs here at which the severing does take place.

MR. COOPER: Yes, I will offer in evidence now the Plaintiff's Exhibit A for identification, which will be Plaintiff's Exhibit 239.

THE COURT: They are numbered from 1 to 24?

MR. COOPER: Yes.

THE COURT: In order that the record may be clear, you made an objection to the question. The Court overrules that objection.

MR. CLARKE: I take an exception.

THE COURT: Certainly. Let an exception be entered without in any way prejudging ultimately the merits of the very questions that you are now raising, and that is understood in this ruling.

(Received in evidence and marked "Plaintiff's Exhibit No. 239.")

WITNESS: Biscuits were made on the machine described without other variation in the process, except a substitution of other cutting machines for the particular form that produced a pillow-shaped biscuit. No change is made in the equipment except in the method of cutting.

Q. 71. Just what was the method of cutting on this exhibit?

A. These were cut with a hand cutter.

Q. 72. From your knowledge and experience as you have given it, was there any difficulty in applying that sort of a cutter to the machine?

A. No, sir, it is merely a matter of changing the shape of the knives.

MR. COOPER: I will offer in evidence the box and contents, which is Plaintiff's Exhibit 240 for identification.

MR. CLARKE: I make the same objection.

MR. COOPER: I understand it goes to the entire line.

THE COURT: The entire line of interrogation.

(Received in evidence and marked "Plaintiff's Exhibit No. 240.")

SECOND DAY.

May 23, 1933.

WITNESS: The box which Mr. Cooper holds contains samples of another form beside one I testified about yesterday. These biscuits were made on commercial machines, all except the actual cutting of them, the wheat was shredded and delivered from the machine. They were cut by hand, but they were shredded

and delivered from the regular and commercial machine to the hand attachment on the end of the machine.

These biscuits are a sort of cone-shaped triangular form. If I might state, these particular biscuits were cut on the machine, except for the diagonal cut. They were made entirely on the regular machine except for this sectional cut across. They are the pillow form as they came off that part of the machine and then cut diagonally; by hand. That is all there is to this.

We take the biscuits in their soft condition just after the pillow had been formed, then take them off the machine and cut once diagonally across from one corner to the opposite corner of the other end. That is what produced this box of biscuits.

No scissors were used. We have to use blunt knives in order to get the selvedge edge.

These diagonal biscuits or cone-shaped biscuits could be produced in the regular production of the machine by some change in the cutting arrangement.

(Box of cone-shaped biscuit received in evidence and marked "Plaintiff's Exhibit No. 241.")

Witness: I am using Exhibit—Photograph No. 15, in Exhibit 239—which shows the panel chain with its cutting knives, and the cutter chain with its knives, and by leaving these chains exactly as they are, and adding a diagonal knife across from the outer edge of one knife to the inner edge of the following knife, you have a diagonal knife, which would come across, and cut diagonally, while the other two were cutting straight.

The output would be exactly the same in tonnage, and double the number of biscuits. I can show you what I mean by that, if I may take that.

(Received and marked "Plaintiff's Exhibit B for Identification.")

WITNESS: Then the bucket chain would also be split to allow the cutter knife to come up diagonally from below, through it, with the other part of the cutting device, for the miniature biscuit.

(Received and marked "Plaintiff's Exhibit C for Identification.")

WITNESS: These biscuit, which I now hold, are doughnut-shape biscuit. We took the sheet of shreds delivered from the machine, and with a set of hand dies, one from below and one from above; those dies were circular with blunt knives, and a small circle in the middle, and cut the biscuit out as we have it here. It would be quite practicable to add suitable knives to the machine itself, to cut out its doughnut form, that is the ring-shaped forms, with the holes in the middle. This would affect the output of the machine—it would be less in tonnage, but not necessarily in the number of biscuits. They would have to have the center returned for shredding..

In the regular manufacture of round-shaped crackers by National Biscuit Company there is such continual scrap loss, the scrap being fed back into the machinery.

(Box of round-shaped biscuit with holes in the middle received in evidence and marked "P Exhibit No. 242.")

WITNESS: The box of biscuit which you have just shown me were made by us. The shreds were taken from the machine in the manner similar to the others. A round piece of disc was used without any circular hole cut out at the center; otherwise they are like the preceding set, and are of the diameter of about three inches. By furnishing suitable round cutters to the regular machine in its regular process, it would affect the output of the machine only by the amount of scrap

that is cut around from the sides. It would be sent back for retreatment. It is a sacrifice of tonnage, but not of number of biscuits.

(Received in evidence and marked "Plaintiff's Exhibit No. 243.")

WITNESS: Here is another box of biscuits, these being round and I think about two and one-half inches in diameter, made in the same way as the last exhibit as to size of cutter. They were cut by hand as the others were. If a suitable cutter for this size were out on the regular machine it would affect the output of the machine in tonnage, but not in the number of biscuits. The scrap as before would go back in the making of subsequent biscuits. Size is the only difference between this and the last. I think our idea in these was that the width of the sheet would just about carry two of these biscuits and there would not be much scrap returned to the machine. There would be less scrap in the two-inch size than in the three-inch size of the previous exhibit.

(Received in evidence and marked "Plaintiff's Exhibit No. 244.")

WITNESS: These round-shaped biscuits would probably be made by a separate cutter on the machine rather than this cutter chain that we have been talking about. This would be a practical change—applying the same method that we use in manufacturing biscuits to the manufacture of Shredded Wheat.

This other box of biscuits—we made these biscuits by dropping the shreds from a single roll down through a tube and as the amount in the one basket accumulated, that was cut off and the biscuit by sort of a slide arrangement on the outside, the inside of the tube was pressed around the edges and passed into the baking. That is to say, this was a molding process from a sin-

gle pair of rolls—the charge being let down sufficiently to fill a mold and then the charge was cut off. It is a practical way to make biscuits commercially, but I do not think it is a practical way to make Shredded Wheat Biscuit commercially. I will take that back. The Shredded Wheat Biscuit could be made commercially, but I do not think with our equipment developed as it is for making Shredded Wheat biscuits, that it would be sensible to go back to this single unit. It would not be as economical as our present machinery. If we had to start over again this would have been a more economic method of procedure because you are faced with the same thing in going into foreign territories. The production on the present machine is so great that until business had been built up we would only be operating the machine one day a month or a week, and a smaller machine like this, and taking less help would be operated more continuously and therefore more economically.

(Box of molded biscuits received in evidence and marked "Plaintiff's Exhibit No. 245.")

WITNESS: In this mold form all the material from the shredders would go into the mold and then you would cut off until the next mold came. We have another machine in use which is designated as the Automatic. In this Automatic machine the wheat is treated in exactly the same manner and the shredding is done in the same manner except that the biscuits are dropped in a row of 12, on a single pan. There are about 3000 of these pans just wide enough for a row of biscuits, long enough for 12 biscuits.

These pans are hooked up by a chain at either end so that they are carried along in tandem; one pan behind the other. The biscuits are dropped on the pan and the chain moves forward and another pan comes along and more biscuits are dropped. In this pan the biscuits are carried into the baking part of the oven.

They travel along about 60 feet and then come back and forth for five passages and then there is a division of the oven and the biscuits go up into a chamber which has a lower temperature and there they pass through about 13 times, when they have completed their evaporation and are delivered to the packer. Always in the same pan. They are taken off by suction on this machine, except that they are dropped on to a pan which just takes one line of biscuits, and that pan moves on and there is no hand handling of the pan. The pan is carried through the oven itself, or driven through, and there are no free pans to be handled. In this machine also by a variation in knives all these various forms that have been introduced could be made.

In the continuous machine the biscuits that have come from the oven are baked more on the bottom than the ones from the other oven. The biscuits which I now hold in my hand have been made on the automatic. They are transferred from the pans to a canvas belt and from the canvas belt placed in by hand. At one time they were packed automatically without the girls touching them.

(Package of biscuits received in evidence and marked "Plaintiff's Exhibit No. 246.")

WITNESS: The girls who handle these biscuits are given medical examinations to see that there is no infectious disease or anything of that sort, and they are inspected by the forelady to see that they keep their hands clean. This is a regular procedure.

I am familiar with the smaller biscuits of National Biscuit Company, such as have been shown to the Court here, and as to the relative proportion of the entire output of the company in these smaller biscuits, off-hand and without looking up the figures, I would say it was in the order of 1 per cent. or thereabouts, perhaps less than that.

As to the daily output of the company in the Shredded Wheat Biscuit, in the summer season it runs about ten thousand cases, and in the winter season about six thousand. A case means 36 cartons of 12 biscuits each—432 biscuits. The winter output, therefore, would be something in the order of about two and a half million biscuits a day. In the summer about ten thousand cases, and that would be about four and a half million biscuits.

CROSS-EXAMINATION.

WITNESS: We discontinued this automatic packing of the biscuits about a year ago, I think. Before that we had been packing the biscuits automatically for a period off and on of three years, I should say. When we used the automatic packing the biscuits were on the trays, a row of 12 on a tray. The rake raked off six of them and brought them in line before two packages. These two packages were side by side, like this (indicating), and the rake at cross angles to the first raked three into one package and three into the other, and then a divider was placed over the first three biscuits, and the next three placed on top, until the carton was filled. Then it was moved out of place and two more cartons brought into place. This automatic shoving machinery shoved the three biscuits over the top of the carton and let them drop over the top of the carton, the first three formed the bottom layers of the packed carton and another machine pushed the partition over from the opposite side and dropped down. If I might have an empty carton I can show that a little better. There was a false bottom that came up through the carton so that the first three biscuits were shoved in on the false bottom, and the false bottom dropped a notch and the insert came on top of that, and then three more came in, and the false bottom dropped

another notch. When packing the biscuit the carton was open at the bottom. When the biscuit is packed by hand the carton is unsealed at the bottom.

The automatic packing was carried on, on and off for about three years. It was in the course of development and we simply operated it long enough to find out places where we wanted to make further development and change until about April, I think, of a year ago, it was operating fairly continuously, and after we had it operating continuously for several days, we put it out of commission. During the three years this was more or less experimental operation.

It is common in the grocery trade to pack other kinds of cereal products by machinery. As far as I know Shredded Wheat Biscuit and that type of cereal, perhaps I might say the product that Kellogg is making, and Muffetts and Shredded Wheat are the only three cereals that I recall now that are in a type that are not packed in a dumped package, as you might call it. They are not a type adapted to dumping, because they have to be placed regularly in the carton or you have to use an oversize carton. If they are not placed regularly in the carton they would be subject to breakage more than they are now. I do not think you can put them in irregularly and get 12 biscuits in without breaking them up. If the oversized carton was used the breakage would come in the movement of the shipment and in handling. Throughout all my connection with the production of Shredded Wheat except those three years experimental operation, the biscuits have been packed by hand. The girls sit alongside of the traveling conveyor that brings the baked and dried biscuit and pick them up and put them in, sometimes one and sometimes two, and insert the partitions. The biscuit then goes on to some machinery which automatically closes the bottom.

The smaller biscuit, being about 1 per cent. in volume, that is made at Niagara Falls, has been made there about a year and a half. These biscuit are packed in little individual packages. This biscuit is partly packed by hand. The two biscuits are taken from the tray and placed in a compartment in a belt. This belt travels, and it is an endless belt with compartments just large enough for the two biscuits that the girl drops on the belt. When the belt comes back they are shoved into a carton which is delivered at that point and the carton is shoved off on a drum and sealed.

As to regular thickness of the shreds of these biscuit, as I recall it, there might have been one or two heads more or less, but they were substantially the same.

Not all of these biscuit are taken with the same number of shreds or strands, and there is no reason why they should have been. To manipulate that we cut off each roll, as many of the rolls as we might want to.

The pointed biscuit which you are showing me is very much arched at the big end than at the little end, and they come off of the belt reversed, the big end, the one at the left, and the big end of the next one at the right. The girls do not reverse them, they pick them up in pairs.

In regard to the full thickness of strands of Shredded Wheat that would be used in packing the regular Shredded Whole Wheat Biscuit, it would be difficult to say just how many. As near as I can make out there are about 12 layers of shreds in half of it and there would be as many in the lower part, I would say there were 20 to 26 strands. That would probably represent the standard thickness of strands. So that this biscuit even at the big end is very much less puffed biscuit than the regular Shredded Wheat Biscuit—running that diagonal cut through there even affects

the arch of the big biscuits, and the little end practically goes down to the vanishing point.

The heat could get in around those shreds for toasting purposes at the little end as at the big end—it is only the outside that is toasted anyhow and so it could be toasted as when it is open.

These biscuits would bake and toast when pressed flat as when the shreds were made homogeneous. They would bake then like a loaf of solid bread, if you pressed and matted them.

The doughnut Shredded Wheat is very much flatter than the regular Shredded Wheat. It has not as many layers of shreds as we have in the regular one. The open texture is there and not the hollowness that we have in the regular biscuit. The shreds are separated one from the other there.

We made dozens of the little doughnut-shaped Shredded Wheat Biscuits. Of the few dozens perhaps a half dozen were brought here. We have experimented on a number of different types other than the pillow-shaped during the course of the last four years, making six or eight different kinds. In the periods when we had a man available we would put him in the laboratory and let him work on those things.

The Shredded Wheat Biscuit is cut in the uncooked state, the biscuit is wider than this one and not so high—in the cooking it rises. If for any reason it did not rise it would go into waste. Possibly half of the shredding machines were cut off to make that doughnut-shaped biscuit.

(Diamond-shaped figures marked "Defendant's Exhibit A for Identification.")

WITNESS: The scrap from the V-shaped portions which are marked "A" would be scrap that would go back. There is no attempt made to figure out the best way of making these to use the least scrap. That al-

ways comes after the product was developed. We never had any difficulty about taking care of any scrap in the industry, I mean fresh scrap from the dough or from the material of this kind. Consequently, when we are designing a new biscuit, we make the best biscuit we can and take care of the scrap afterward, and we never have had any cases where the scrap was not economically taken care of.

The drawing Mr. Clarke made of the diamond-shaped biscuit is about as good as I could make. The V-shaped edge in between here, that material would be wasted in the sense of going back to be reshredded, the material marked "A" in the sketch.

To cut these biscuits we ran them out and dropped them on a long string and dropped them on a solid pan and cut them on that. The shreds were not moving when they were cut.

Our entire production in Canada is run on the automatic machines and about perhaps 15 to 20 per cent. of the production on the American side of the Falls. So that 15 or 20 per cent. of our American production are biscuits that are darker on bottom or toasted more on the bottom than on the top, and about 80 or 85 per cent. are relatively light-bottomed biscuits as compared with the top. The automatic output is fairly well confined to one territory—New England. There is no difference in the cartons between New England territory and the rest of the country, the cartons are the same as standard cartons. There is nothing on the cartons to indicate whether the biscuits on the inside of the cartons are dark-bottomed or light-bottomed.

The triscuit is rolled down and flattened down so that it does not rise so much. That is the way the regular Shredded Wheat is run into a cracker form—the same wheat in the same shreds and in one case you puff it up into the pillow-shaped biscuit and in the other case you run it between rollers to make the triscuit.

The packed down biscuit marked "Plaintiff's Exhibit 245" differs from the Triscuit in packing—This is merely dropped down through a tube and the triscuit comes along on the accumulator chain exactly the same as the Shredded Wheat biscuit does. There is a roll rolling it down flatter or tighter and matting it together a little bit and these are cut out into squares and baked between waffle irons to hold them down and keep them from rising. In Exhibit 245 the shreds are rather more mixed up than in the regular Shredded Wheat biscuit. They run in all different directions because they drop straight down from the roll. This triscuit has not longitudinal axes as the regular Shredded Wheat has.

I recognize the Uneda Bakers Triscuit, 100 per cent. Whole Wheat Cracker and the statement "Made of shredded whole wheat, compressed into a cracker and baked crisp and brown." Triscuit is a little crisper product, not crispier, but it has been matted down so that it is a little more solid. I do not think that any of the shreds in triscuit are any more welded together than they are in the biscuit. The triscuit is, instead of being cut into separate sections like this, is carried along the width of the biscuit, a sheet of the wheat is dropped on a hot plate. There is a series of these hot plates carried on a chain. The biscuit is dropped the full width on the waffle iron and there is a slit in the middle of the waffle iron as sections raise.

Another waffle iron comes down on top of that and they are held together with some pressure, so that it is impossible for the triscuit to spring and rise. The wheat is a trifle drier than the wheat in the Shredded Wheat biscuit, so that there is not the tendency for the shreds to weld together and here while they are pressed down, perhaps matted, they are still identical shreds for the most part.

There is no tendency to more welding in the Triscuit than in the biscuit. We do use the same wheat

occasionally for the Triscuit that we do for the biscuit, and we do not notice a good deal more welding.

We have used an intermixture of Durum for both the triscuit and the biscuit. We use the waffle iron to prevent the natural springing up. In making the triscuit we use a little less moisture content than in making the biscuit, but it is unnecessary. For a long time we did not do it, and we used the same wheat, and we found it baked out a little drier and made a product that perhaps was a little easier to handle than the other was.

Invariably we use the same wheat in making the biscuit as in the triscuit. There can be some variation, except as to moisture, but not as a general routine. We do not as a matter of fact always use the same proportion of Durum wheat even in our biscuit.

We use the Durum wheat partly as a matter of flavor and partly a matter of economy and partly a matter of the operation of the machine. It is a matter the same as in your own plants you find you can handle certain material to your advantage at certain times.

Output of production or sale of the triscuit has not developed anything like the relative proportion of the biscuit. I would say it was holding up better than the Shredded Wheat itself. The demand of the pillow-shaped biscuit has been falling off more rapidly than the production of the triscuit.

The proportion approximately of production of the two products I should say is about—the triscuit is about 2 or 3 per cent. of the production of the pillow-shaped biscuit.

Besides the three products of Shredded Wheat referred to—Triscuit and the standard or large pillow-shaped biscuit and the small pillow-shaped biscuit, a product called Triscuit, but considerably larger than this present size, was made. Later it was changed to this size.

The so-called scrap from the biscuit after it is toasted and baked, we sell it—the crippled biscuits that do not get on the floor are ground up and sold as Silver Fox food or dog food, and the sweepings off the floor are sold as chicken feed.

Some of the scrap biscuit has been sold in small quantities for human consumption, but I do not believe it is sold now. If it has not been dirtied or contaminated it is just as fit for human food as the regular deformed biscuit.

If we got anything like the price for that that we get for the regular undeformed or broken biscuit we would be away ahead of the business. The profits would be much greater.

We compute the larger profit at a lower price because we have no packaging cost and no handling cost and we have lower shipping cost and lower package material cost. The packaging and the package and the shipping and the selling costs are practically all out of it. Pound for pound, without regard to these other things, the scrap sells for very much less than the price for the finished product. It is sold by the hundred pounds.

There is no retreatment. It is ground uniformly. When it has been on the floor, it goes into chicken feed. The dog food is crippled biscuits that are picked off the pan. The first girl on either side of the packing table is an inspectress as well as a packer. Her duty is to pick off any crippled biscuits and place them in a box beside the packing table.

I did not mean to convey the idea that the percentage of labor on the finished product would be any less or any more, but the regular machine turns out such a quantity that if you had a small outlet, it would be cheaper to operate a small machine continuously than it would to operate a large machine occasionally.

Are you speaking of National Biscuit Company or the Shredded Wheat Company when you ask if we have

tried to market any other products besides the four mentioned? I do not know about the old Shredded Wheat Company, but National Biscuit Company has had a number of these products up that would be marketed in normal times, but due to conditions in the last three years, we have not been able to get our people to authorize the production.

Yes, I am familiar with the product called Muffets. It is not a Shredded Wheat product, this Muffet product. It is a rolled ribbon product—a ribbon wheat product. Rippled Wheat, Muffets, etc., are all made on the same type of machine, and it just depends on what you call it. The first products called Muffets is a ribbon wheat product and you would have to adjust the machines, the rolls are further apart. The slackening off of the tension gives us a ribbon and bringing them up tighter gives us a shred. We have not used ribbons for any purpose in the last two or three years. Before that we did. Then we used them in the summer time when the wheat was a little sticky and the air was hot and light, they had difficulty in holding these biscuits up on the suction plate for panning.

It was then a common practice to open up three or four rolls in the middle of the machine and run a ribbon into the biscuit, so that when the suction worked up through there, it would have a solid piece to work on rather than coming up through the loose shreds, and that would do a better job of panning. The Shredded Wheat would have a sieve-like quality. When we ran the ribbon strip through the center we got a suction that we did not get without it.

XQ. 307. And this rippled wheat, taken from a rippled—

THE COURT: This ribbon is not a shredded thing?

MR. CLARKE: No, it is not shredded, but ribbon wheat.

THE WITNESS: As a matter of fact, none of it is shredded.

By MR. CLARKE:

XQ. 308. It is all ribbon?

A. It is all rolled and you either roll it into a sheet or into shreds.

By MR. CLARKE:

XQ. 309. You do not mean by that answer to say that when the rolls are close together, the product does not come out in these shreds or strings, but in the form of ribbons, did you?

A. Yes, sir. It all depends on how close together you have them. It is very difficult to get them close enough together to cut this wide ribbon into smaller or narrower ribbons or strings or shreds.

XQ. 310. Did you mean to tell me that none of the wheat that you make is shredded wheat in the sense of it being shredded, but it is all ribbon wheat?

A. I would say so, if you are trying to describe it, yes.

XQ. 311. And by ribbon wheat you mean these little shreds that we show in the demonstration machine coming down last night, do you call these little separate shreds?

A. We do not call it ribbon wheat.

XQ. 312. Is it anything like the wheat I have shown you in the rippled wheat or the Muffet wheat?

A. Yes, it is exactly like it, except that the ribbons are not entirely cut apart. Look at this rippled wheat and you will see many places where this ribbon is almost cut into finer parts or bands or shreds.

XQ. 313. I am not interested in your definition of words, but I want to find out what you do. Do you mean to say that your rolls are operated in the same way in making the regular pillow-shaped biscuit which is put on the market as Shredded Wheat Biscuit, that

the rolls are manipulated in making this rippled wheat or muffet?

A. I have never seen either of these articles made, but I would say that we could make this rippled wheat with our rolls—

THE WITNESS: Perhaps our greatest difficulty is to keep from running a product of what you call a ribbon type, so that we are almost always through the day sometimes running ribbons when we wish it were being cut into threads. We adjust the rolls closer together to make threads rather than ribbons. This is a ribbon. You can see those are cut this way. If the rolls are brought a little bit more together, there would be a series of narrower ribbons or threads. The whole surface across here is what you call a ribbon. I can make some on this machine. We do not like to get these tied together in our biscuit. All these are really corrugated ribbons. If these corrugations are cut through, you will get others.

When we find we are running ribbons instead of threads, we adjust the rolls to bring them close enough together to make threads, except in the summer time we used to adjust the rolls to make ribbons in the center of the biscuit. Now we try to prevent that. You cannot keep an operator from occasionally trying it when nobody is around and he is having trouble. We watch the operators so that they will not give us the ribbon form rather than the shredded form. It is very difficult to keep the 29 heads running with the correct adjustment. As the heads run in the morning, they start off cool, and as they operate, the rolls warm up and expand and tighten up and they have to slack off a little bit or adjust the tension one way or another, and that is a constant operation throughout the day.

We object to the ribbons being in the biscuit because we are not making a Muffet. We are trying to make a uniform product and we do not want two or

three different characters in the same biscuit any more than any other manufacturer wants an ununiform product.

(Chart entitled "Educational Exhibit of Shredded Wheat Biscuit" admitted to have been put out by Shredded Wheat Company, was admitted in evidence and read to the witness.)

That chart is a substantially true outline of the process in making Shredded Wheat Biscuit and Triscuit with a few corrections. I think you said 36 sets of rolls in your outline, and there are not now 36. The machinery has been changed occasionally. 36 pairs of corrugated rolls, and there are only 29 now on the standard machine, and the cooking of the wheat cooked by steam—it is not really steamed, but it is boiled. The steam is used to boil the water. Substantially it is the same.

Some rolls have grooves a little deeper. I do not think that we usually make a distinction on where the rolls with the deeper grooves are put. They may be on the bottom or in the middle or at the top of the biscuit.

As to the deeper grooves being always at some certain place on the bank of the 29 machines, it depends on how the machine is being operated. If some of these rolls wear out more rapidly than others, you will have to change the rolls, and if that change happens to come on the bottom, and we need 24 in there, we might put a 24 in there. I do not know that we make any conscious effort to keep them in the middle or on the bottom. We lately have not put them on the top at all. By 24 I mean a twenty-four thousandths of an inch groove. The grooves wear V-shaped. I believe originally they are not quite a V-shape. We did not change them. I say that originally they are milled out with a flat bottom. The cutting tool gives a flat bottom to them, but

as they wear, that flat bottom may be narrowed down to a V-shape finally. They do wear into a slightly different shape. The deepest groove we use is the twenty-four-thousandths. It is immaterial where these grooves go—on the bottom or in the center. The 24 is the deepest groove and 18/1000ths is the shallowest.

I have nothing to do with the marketing of the Shredded Wheat business, just the production. I was directly in charge with headquarters at Niagara Falls until October. Then when I moved to New York, another man was put in charge, who clears through me. In other words, I still have charge of Shredded Wheat manufacture. I am also chief chemist of National Biscuit Company. The production man at Niagara Falls is under me—I am his production superior. J. H. Haddon is directly in charge of the production at Niagara Falls. His title is production manager, Shredded Wheat Bakeries. He reports to me in New York at National Biscuit Company offices. There is a laboratory there. I have a desk in the laboratory where I spend about half of my time during office hours, and a desk in the Production Department proper, where I spend about the other half of the office hours.

I visit the plant at Niagara Falls on the average of once a month.

The so-called waste or scrap which has not been toasted or baked would make better Shredded Wheat when put back through the shredding machines because the re-shredding of it operates much the same as mixing dough. It gives a little more cohesion and gives a longer shred. It can hardly be called dough, though it is more like working dough, but the re-shredding of it does not form a dough by any means. It is probably an action on the gluten in the wheat. The more the gluten is worked and moulded and pressed, and so on, the more cohesion it has and the more it adheres together. The unbaked scrap was fed back through the

rolls. It feeds more easily through the rolls than the wheat grains.

To describe how it goes down—well, as you might pick up an unbaked biscuit and drop it into the rolls, it would be shredded. You could reach into the box and take out a handful and put it in. It is taken back to the shredding rolls as the pan goes by. The inspector takes the biscuit off and places it in a box, and that box is taken back, when it is filled, it is taken back to the reshredding head and fed into it. Sometimes it is fed into any of the rolls, and usually the downspout of one or two heads is hinged so that it can be folded back and the material fed into that particular one. Actually it may be fed into any of them. From my recollection I would say that the rolls that are hinged are those about eight or ten heads from the top. It may be farther than that. It is an intermittent process.

You ask what elements go into this picking out of the biscuit that makes that twice worked dough and if there is an inspector there. Any biscuit that overlaps another to an extent that that can not be just touched and brought away. If the biscuit goes into the oven overlapping another one, naturally this biscuit is spoiled in the beginning, and this biscuit is spoiled. If there is a very slight overlapping, they get touched and brought away. If it had to be handled to any extent beyond just a slight adjustment, the biscuits are picked out and dropped in this. Either one, depending whether they are baked or not, goes back into the discard. The edge that is formed on the Shredded Wheat Biscuit where the knives cut in the baking, that is a much harder product. It has a thicker ribbon than the rest of it. There is more edge on the samples than there would be in production. I mean the samples were not made with any intent to avoid having an edge on them.

The pillow-shaped biscuit contracts a slight amount under the effect of heat in what might be called a longitudinal direction; the principal contraction is in a direction parallel with the lay of the shreds. There is considerable puffing there.

(It is conceded that so far as counsel are advised, and they believe they are fully advised, no applications for design patents have been filed on any of the forms of sample biscuits produced by witness.)

This puffiness is due to the contraction. The shred, as you see in the grains of wheat, the grains are almost twice the size of the original, so that the shred that comes here is about twice the size it will be after it is evaporated. That shrinkage is offset to some extent by the nature of the baking portion of the steam keeping it in that condition. The shreds were tight at either end, and as they shrink they pull the biscuit together. The outside takes faster, therefore shrinks before the inside does, and in shrinking on the outside, it shoves against these inside shreds, and makes them fold up, and press up the inside in the bottom and the top. You see these up and down folds.

When the machine is adjusted whatever adjustment you want, it automatically shreds the wheat that is fed into the rolls and deposits it down on a traveling belt and gives these long ribs or strips of wheat shreds. The machine as it is now automatically cuts into the pillow-shaped form ready for toasting and baking. With the present equipment it cannot produce anything else except the pillow-shaped form of biscuit.

The biscuit is first baked and then dried. We never try to define baking very definitely, but baking usually does resolve in some browning, and the operation is to put the biscuit into the oven for baking and transfer it to the evaporator for drying.

We consider the cooking is all done in the cooking machine, and the cookers—in the wheat before it is shredded. All we do from the baking is to really brown it and cook it on the outside and not on the inside. That is practically all the baking, the starch, the wheat itself has been thoroughly boiled, which you can consider cooking, if you like. The baking oven browns the outside and dries it out to an extent, and the browning is merely evidence of the starch being dextrinized by the heat. There is not much of any other effect that can take place in the oven, unless it is carried far enough to carbonize them in baking them. From there on we do not regard it as a cooking operation, but merely as a drying operation—the remaining moisture is dried out.

I have been connected with the Shredded Wheat only since National Biscuit Company took over the Shredded Wheat Company. My experience with Shredded Wheat has been since 1929.

Mr. John H. Hadden who is directly in charge of production of Shredded Wheat is also a National Biscuit Company man.

As to men who were with Shredded Wheat before National Biscuit Company took it over, we have Wallace, who is in charge of the English plants, who has been with the company since they moved to Niagara Falls; Mr. Wheeler, who is in charge of the Erie Avenue plant, Niagara Falls, and who has been with us since they came to Niagara Falls; Mr. Reed in the Buffalo Avenue plant, who has been there 15 or 20 years; Mr. Campbell, who is in charge of the Oakland plant, and who has been with the company for 15 to 20 years or 25 years. There are a dozen others I could mention.

Mr. Wallace who is abroad now has already testified by deposition.

By MR. COOPER:

RDQ. 414. Can you conveniently, Mr. Oakes, illustrate on this little shredding machine which is here in court, how an adjustment could be made, so as to get what counsel called "ribbons" in place of what are distinguished as threads or shreds?

WITNESS: These rolls are driven exactly the same as any pair of rolls on the regular machine. In other words, there is one pinion gear back here operating on a gear directly attached to the roll. That gear drives the same sized gear on the other rolls, so that the two are moving in exactly the same speed all the time. There is no slippage of one roll past the other. These two bolts go through and hook on to the back rail, and by tightening them up, the one roll is pressed up tight against the other. As that is slacked off, there is space between the grooved roll and the smooth roll, so that the wheat can go through.

THE COURT: Which is grooved and which is smoothed there?

THE WITNESS: This back roll is a grooved roll, and this one is, the smoothed (operating machine)

MR. CLARKE: Both are grooved on this machine.

WITNESS: No, sir. This is a smoothed roll, but due to the operation, the grooves have cut tiny marks on the smooth roll.

RDQ. 415. Now you have adjusted the machine so that the product is coming through in a ribbon-like form?

THE WITNESS: These ribbons are almost cut through into tiny ribbons. They can be opened up wider, so that you get a solid sheet down through

there, and in places you can see they are almost cut through. By setting up the two rolls closer against one another you can get them in a narrower form—as we tighten these just enough to bring the grooved roll up against the smooth roll, the product comes out in the form of, you might say, a great many very narrow ribbons, instead of one wide ribbon. It is the same as the wheat itself cut in the middle. Now, by opening the machine up still wider, you get a product of a slightly different character; with the bran of the wheat appearing as spots, instead of being rolled out into portions, by opening the machine still further.

THE WITNESS: We do not manufacture this product—by opening it up still further, the wheat will come out as rolled wheat, exactly the same as rolled oats would come out if they were put through a set of rolls.

MR. COOPER: If your Honor please, I may say I know of no way to preserve as evidence, those products of the machine. My suggestion would be that I might mark for identification the machine itself. That might be called D for identification, and it is the machine with which the two members B and C, the parts of the mould we previously used; and I presume that if in an Appellate Court, for example, it were desired to see these, we would simply have to operate the machine over again before the Court and show its product.

MR. CLARKE: There is no claim that this is a replica of any production.

MR. COOPER: No claim made for anything, except that the witness was asked on direct examination about that difference, and I was simply illustrating the difference.

RE-CROSS-EXAMINATION.

THE WITNESS: This wheat that was just out through this machine was cooked Saturday night about seven o'clock. We do not keep it that long in regular production if we can help it. We have operated on that on a cycle. There is not much difference in the biscuit. You may have a little more difficulty in the operating, but the handling is easier. The wheat is a little shorter and more of a tendency for the shreds to break as they fall down from the rolls to the accumulator chain. The wheat of the shred will break up before it gets long enough to reach the chain—the tendency is a thinner thread itself. I do not know that there is much difference in the baked shred.

WILLIAM A. HANNIGAN.

DIRECT EXAMINATION.

My name is William A. Hannigan and I live in Wilmington, Delaware. I am in the wholesale grocery business. The name of the company is J. D. Sissler Company located on King Street—at Third and King—Wilmington, Delaware. I am president of the company and have been with the company twenty-seven years—1906 to 1933. The business of the company is distribution of food products in a wholesale way. We purchase from the manufacturer and sell to the retailer. During all the twenty-seven years we have handled a product known as Shredded Wheat. Originally we knew of Shredded Wheat as being made at Niagara Falls.

Plaintiff's Exhibit 1, which you hand me is the package that I referred to a moment ago as Shredded Wheat. When we ordered or desired that product from the manufacturer we ordered so many cases of Shredded Wheat. Shredded Wheat I think it com-

monly went as. It was known to the trade as Shredded Wheat. The product was ordered from us by the retailer as Shredded Wheat. That term indicated to me, one of the members of the trade, the source or origin of that product. We handled it continuously; we handled it in supplies of duration of about two weeks period. We figured how much we would use in that time and placed our orders accordingly. Without definite records I should assume that we sold between 1200 and 1500 cases a year. Our territory was from Wilmington to Cape Charles, embracing about 12 counties in Delaware, Maryland and Virginia. We covered all of the territory known as the Delmarva Branch.

CROSS-EXAMINATION.

I am not actually out of the wholesale grocery business yet. My connection is still the same. I am winding up or liquidating our business. It is not fully liquidated yet. It went into liquidation about eight months ago. I was in the wholesale grocery business up until that time and even right now. We still have merchandise to sell.

We did handle the Kellogg Whole Wheat Biscuit in our business and sold it to the grocery trade whenever it was called for. Unless Kellogg's biscuit was specified, this biscuit was always sent (indicating Plaintiff's Exhibit 1). That was up until about eight months ago.

I do not know anything about orders for Niagara Shredded Wheat being sent on orders for Shredded Wheat—I know only about my own business. It has been done, but I would not say that it was done specifically towards Shredded Wheat.

I was a wholesale grocer at the time that the Shredded Wheat Company was taken over by National Biscuit Company. We received a circular from Na-

tional Biscuit Company advising that the biscuit would be distributed from their local office, but we still continued to buy from the local office paying their price in order to accommodate our trade.

We did not have any special buying arrangement with the Niagara Falls Company—the National Biscuit Company, only general. Just the same as applied to all other purchases that we made; that we send our orders in in the regular fashion and keep our credit in good shape and consequently were able to purchase.

After National Biscuit Company took over Shredded Wheat Company we still continued to receive the product and we could not have been cut off.

We did receive a notice that thereafter they expected to serve the trade directly rather than through jobbers. If there was a delay occasioned by the notice it was only because of the selling out of the stock we had on hand—without putting any new orders in. We did that naturally, to keep our stock fresh. We gauged a couple of days in advance. At the time this notice came from National Biscuit Company there was a departure for the time being from that practice, we sold out what we had on hand without overlapping the order for a new supply.

Before they were out we made arrangements for purchase. National Biscuit Company then made arrangements allowing as to continue as a jobber, and up to the time of our liquidation we continued as a regular jobber for the National Biscuit Company product. This arrangement did not make any difference in our efforts to sell either the Kellogg product or National Biscuit product. We were distributors and we did not go out and push the sale of any particular product, because advertising usually obliged us to fill the demand for it. That is until we went into liquidation.

We handle the rest of the Kellogg line, but not the rest of the National line—just the Shredded Wheat. Kellogg's is known as a Shredded Wheat biscuit and was known to ourselves as a Shredded Wheat biscuit. It looked like Shredded Wheat, but I am not competent to judge whether it was wheat. I was only a seller. I would not make the statement whether either of them was a shredded biscuit. I only know them as called for by trade.

HARRY W. FRAZIER.

DIRECT EXAMINATION.

THE WITNESS: I reside in Wilmington, Delaware. I am in the retail grocery business and my store is located at 822 Market Street. I have been located there I guess about 39 years, 38 or 39 years. The name of the company is Thomas J. Lawson Company. The company has been operating that store for a number of years. I have been with Thomas J. Lawson Company forty-eight years in all. That includes the John P. Allman and the Lawson Company. We were originally located at Eighth and Market where the Union Bank is. At the present time I am the owner of the Thomas J. Lawson Company.

I know what Shredded Wheat is from the selling of it. The package marked "Plaintiff's Exhibit 1" is the package we sell as Shredded Wheat. I cannot say exactly how long I have known Shredded Wheat, but I venture to say 30 or 35 years.

When we ordered the product in the carton similar to Plaintiff's Exhibit 1, we ordered Shredded Wheat and when customers asked for Shredded Wheat we supplied Plaintiff's Exhibit 1—this package of Shredded Wheat.

CROSS-EXAMINATION.

We handle the Kellogg's Shredded Whole Wheat Biscuit marked on the carton. We have bought some of that this year, one carton. We call the Kellogg's Whole Wheat Biscuit. We know it is a Shredded Wheat Biscuit that the Kellogg Company is making. I have read from the end of the package that it was Kellogg's Whole Wheat Biscuit made from a process with Shredded marked on the package.

I have seen the Kellogg Biscuit outside of the package. It looks similar and is very much like this biscuit, but a little shorter. I have no doubt that it is a Wheat Biscuit. I do not think I have any doubt that it is a Shredded Biscuit. It looks to me to be very similar in many respects. In fact it looks like the Shredded Wheat.

We sell so little of the Kellogg Biscuit that I do not know we have ever tried to explain what it is or what it is made of. Our calls or demands are for Shredded Wheat almost entirely. We will sell a case or two of this a week and we bought one whole case of the Whole Wheat Biscuit since last fall. That is not the first time we handled it, as we have cereals of all kinds. I should say we have handled the Kellogg product about two or three years.

We have never tried to sell it, representing that it was National Biscuit Company product. If some one asks for Kellogg's Whole Wheat Biscuit we will want the goods to supply the order.

We never practice substitution as we are very much opposed to it.

XQ. 37. As a practice in the grocery trade, that type of fraudulent substitution is practically obsolete?

MR. MORRIS: In the witness' store, or is the question now intending to—

THE COURT: Is fraud obsolete among grocers, I do not know that that is relevant, and it is sustained.

XQ. 38. It certainly is obsolete in your store!

MR. MORRIS: That is an inference that—

MR. CLARKE: I think that is directed absolutely to the issues.

THE COURT: I know about that store since I am six years old.

MR. CLARKE: But the issue of this case is exactly that, as I understand it, on the law. There is no law that has been cited here except fraudulent or deceptive substitution and the question has been put to practically every grocer without any reflection.

MR. MORRIS: That has nothing to do with the question as to whether it is obsolete in Mr. Frazier's store.

THE COURT: There is an innuendo there. The inference is that it previously existed.

MR. CLARKE: I did not intend that.

WITNESS: There are times when goods might be substituted, but we aim to call the customer and ask them if they would care to have us send something else in case of our being out of some particular item, but to substitute for our trade will not work.

We have handled Kellogg product about three years. We have had one case this season. We put that case in to fill a consumer demand for the Kellogg product; if one calls for it.

I do not know whether I can answer correctly about whether the customers ask for Kellogg Whole Wheat Biscuit or Kellogg Shredded Wheat Biscuit, but I would say that they would ask for Kellogg's Whole

Wheat Biscuit—if we received orders for Kellogg's Whole Wheat Biscuit—if they would ask for Shredded Wheat, we would send this—Plaintiff's Exhibit 1.

If they asked for Kellogg's Shredded Wheat we would give them Kellogg's product.

I happened to come here today as a witness because a representative of National Biscuit Company called to see me and asked if I would come here as a witness. We handle the cracker line of National Biscuit Company—we have dealt with that company for many years. We handle other lines, such as Sunshine and Ivins, Keebler and quite a number of them, Huntley and Palmer and foreign crackers.

HOWARD DUANE.

DIRECT EXAMINATION.

I am a member of the Bar of this Court and of the State Courts and have been such for a number of years. I know Shredded Wheat having been accustomed to eating a Shredded Wheat Biscuit from time to time. I would say that I have indulged in that practice for about 20 years.

Shredded Wheat means to me the product of what used to be the Niagara Falls Shredded Wheat Company, and has recently been taken over by the National Biscuit Company.

On April 25th I had breakfast at the Union News Stand in the Pennsylvania Station here in Wilmington, and I looked at the menu and on the menu was Shredded Wheat, and I asked for Shredded Wheat, and instead of giving me Shredded Wheat they gave me Kellogg's Wheat Biscuit. As I remember it, it was in a small carton with two biscuits in it. I had two biscuits for breakfast.

On another occasion, I remember, I would not say how many years ago, but it was probably two or three years ago, one box of Kellogg's biscuits got into the house, and we had always had the Shredded Wheat.

CROSS-EXAMINATION.

I saw immediately that the biscuit handed to me in this carton was not the biscuit I had been getting. I noticed the size was shorter than the Shredded Wheat Biscuit. I knew it was not the biscuit made by National Biscuit Company or the Shredded Wheat Company.

I had a conversation with the waitress about it. I asked her why, when I asked for Shredded Wheat, I was handed Kellogg's Wheat Biscuits. She did not say anything, but shrugged her shoulders and walked off. I have not had a meal there since. I ate there because I was on my way to New York on business and was waiting for the 8:25 train.

I eat Shredded Wheat about once or twice a week.

The product that I consumed at the station was not Shredded Wheat. I knew it was not Shredded Wheat. It was wheat that was shredded, but I knew it was not the product of the Shredded Wheat Company. I knew it was not Shredded Wheat made by National Biscuit Company but Shredded Wheat made by the Kellogg Company.

RE-DIRECT EXAMINATION.

THE WITNESS: It is not true that I had been asked to come to this place and ask for Shredded Wheat.

I told Mr. Culbertson, an associate of Mr. Morris, that I got Kellogg's Biscuit when I called for Shredded Wheat and that is the reason I am here.

RE-CROSS-EXAMINATION

THE WITNESS: I was up here to see the clerk of the Federal Court office about two weeks ago and I heard

a discussion about Shredded Wheat Biscuits and Kellogg's Wheat Biscuits and this case that was coming on for trial, and I was here on another matter, and I just remarked that I thought I could be a witness for somebody and related this story. That is the way Judge Morris's office got it.

Shredded Wheat to me means the product that has been made for years at Niagara Falls, New York, and formerly of the Shredded Wheat Company, and now as I understand it, although I do not know, controlled by the National Biscuit Company. That information is written on the package. All the packages that I have ever seen said that this was the product of the Shredded Wheat Company of Niagara Falls, New York, and recently it has had something about National Biscuit Company as successor. I saw that many times on the packages.

MR. VILAS: If the Court please, we have agreed for informality of the proof that I may introduce a sheet drawn from the *Tampa Morning Tribune* of Saturday, July 9, 1932, containing an advertisement of Kellogg's Wheat, which I now offer in evidence.

THE COURT: Any objection?

MR. CLARKE: No objection.

(Received in evidence and marked "Plaintiff's Exhibit No. 247.")

MR. VILAS: I offer as plaintiff's exhibit a sheet drawn from the *Tampa Daily Times* of Friday, July 8, 1932, which contains an advertisement of Shredded Wheat, with the word "Kellogg's" in smaller type and a cut of the plaintiff's carton.

(Received in evidence and marked "Plaintiff's Exhibit No. 248.")

MR. VILAS: I also offer in evidence a sheet, page 5 of the *St. Paul Pioneer Press* of Wednesday, April 26, 1933, containing among other things an advertisement of one Schoch, a witness who testified on behalf of the defendant during the taking of the depositions.

(Received in evidence and marked "Plaintiff's Exhibit No. 249.")

MR. VILAS: The plaintiff now offers the depositions which have been taken in this case. I may state very briefly, your Honor, that the defendant has examined in round numbers—the plaintiff has examined 160 witnesses, and the defendant approximately 180 witnesses. The depositions have been recorded pursuant to stipulations between counsel.

MR. VILAS: The record now discloses that we have offered all depositions of record and certified to the Court, both on the part of the plaintiff and the defendant and the respective cross-examinations.

Let me at this point call attention to the fact that there is a stipulation which we will offer which was made in a suit brought by the Shredded Wheat Company against certain distributors of the Kellogg Company and against the Kellogg Company in the District Court of Connecticut.

That suit was pending when the Biscuit Company acquired the Shredded Wheat Company, but after about a year was dismissed without prejudice upon the stipulation which permits either counsel to use any depositions already taken in that case, in any future litigation involving the subject matter.

THE COURT: We are not using such depositions here.

MR. VILAS: Yes, I am asking leave to file a small volume of depositions which were taken by the Shredded Wheat Company and counsel for the Kellogg Company, pending the proposed trial of that case. I have that here.

THE COURT: The Court suspends any rulings as to the admissibility of depositions taken in another case.

MR. VILAS: We will produce the stipulation pursuant to which I now offer them, and I ask leave to refer at the moment to them in connection with some historical testimony.

MR. CLARK: If your Honor admits them then I will offer the cross-examination, but I am objecting to them as having no bearing on this case. This case has been fully tried and depositions showing the whole trade situation, and 317 or more witnesses were examined on both sides.

THE COURT: My objection is that you are launching into an unfortunate precedent. If the Third Circuit Court of Appeals has spoken, that is the end.

THE COURT: The Court initiates the objection on its own part.

MR. VILAS: Again I ask leave to read just the pertinent lines of the stipulation, because I think they have some bearing on the discussion.

MR. MORRIS: Should not the stipulation be offered in evidence?

MR. VILAS: I so offer it:

"The Court consenting thereto, it is hereby agreed and stipulated"——

THE COURT: What Court?

MR. VILAS: Connecticut District.

MR. CLARKE: The Federal District Court.

MR. VILAS: "The Court consenting thereto, it is hereby agreed and stipulated among the several parties hereto that this suit may be and hereby is ordered dismissed without prejudice, and with the condition that should plaintiff, or its successors, sue again upon the same cause of action, or bring any other litigation involving the same, or related subject matter against these defendants, or any of them, or their successors, representatives, agents, or privies, in this or in any other Court or before the Patent Office, then any party to such litigation may avail himself or itself of any part of or of all of the proceedings, orders, testimony and depositions heretofore had, entered or taken in this case, or for use herein, to the same extent and for the same purpose as though the same had been taken, had or done in such litigation."

That was signed by the plaintiff and by the Kellogg Company by its president, the Kellogg Sales Company by Will K. Kellogg, and also by Mr. Kellogg individually and also by the other defendants who are distributors.

MR. CLARKE: They were not parties defendant in this case.

MR. VILAS: But they signed a stipulation of dismissal.

THE COURT: Do you offer the stipulation as evidence?

MR. VILAS: I offer it.

THE COURT: Admitted.

MR. CLARKE: Exception.

THE COURT: Let an exception be entered.

(Received in evidence and marked "Plaintiff's Exhibit No. 251.")

THIRD DAY.

May 24, 1933.

MR. MORRIS: Yesterday afternoon my associate, Mr. Vilas, offered in evidence the depositions taken in the case between this plaintiff and one of the dealers of the defendant, in which suit this defendant was named a party, but not served, but in which a stipulation was filed, which was signed by this defendant, stipulating that the depositions taken in that case, should be admissible in any future case between the parties.

The case to which I referred was 263 Fed. 481, the opinion of Judge Woolley. The witnesses were dead. One of the cases relied upon by Judge Woolley was 137 Fed. 48, decided by the Circuit Court of Appeals for the Sixth Circuit. In view, however, of the fact that the defendant objects to the admission of these depositions, notwithstanding the stipulation, we withdraw the offer.

MR. CLARKE: If your Honor please, we are prepared to withdraw all objections to the tender of the depositions that they want. The depositions were not actually offered in the other case; but they all showed there was no confusion between the parties at that time, when the defendant's product was first put on the market. I withdraw the objection, if they want to offer those depositions.

MR. COOPER: There are a few matters, your Honor, by way of offer to close our case. First, I wanted to call attention to the defendant's answer which contains an affirmative defense in many paragraphs. Now, Rule 30, I think it is, for Courts in Equity, Supreme Court Rules says that the averments of an affirmative defense in an answer are deemed denied.

Some of these affirmative defenses which we explicitly admit in our reply to the answer, to the affirmative defenses of the answer, but being a little uncertain as to whether those affirmative defenses will be taken as admitted without further proof under the state of the pleading, I will offer two paragraphs from the affirmative defenses as an admission against interest of the defendant.

They relate simply to formal matters, and I think will avoid considerable documentary proof.

THE COURT: Whose admission?

MR. COOPER: The defendant's admission as contained in the averments of its affirmative defense.

In our complaint we aver our corporate capacity and the defendant's corporate capacity and the like and the answer first proceeds to deny all those averments, and then proceeds, under the heading of affirmative defenses to aver certain of those facts, and it is that pleading which I am offering in evidence as an admission against interest. Section 1——

MR. COOPER: Section 1 of the affirmative defense, reads:

"1. That the defendant Kellogg Company is a corporation organized and existing under and by virtue of the laws of the State of Delaware, a citizen and an inhabitant of said State, and has a manufacturing plant at Battle Creek, County of Calhoun, and State of Michigan, and that plaintiff National Biscuit Company is a corporation organized and existing under the laws of the State of New Jersey with a regularly established manufacturing plant and place of business at New York City, in the Southern District of the State of New

York, and another factory at Niagara Falls in the State of New York."

I offer that in evidence as an admission against interest.

The next paragraph of the affirmative defense is No. 2:

"That on information and belief, Cereal Machine Company was duly incorporated under the laws of the State of Colorado on June 8, 1893; that it was engaged in the manufacture and sale of a Shredded Whole Wheat Biscuit, an edible product; that Henry D. Perky was the founder of the business of said Cereal Machine Company, and was President of said Cereal Machine Company; that on or about the 17th day of May, 1900, the name of said Cereal Machine Company was pursuant to the laws of the State of Colorado, duly changed to Shredded Wheat Company; that in the year 1900, the Natural Food Company, a corporation, was duly organized under the laws of the State of New York, and that in the year 1900 said Natural Food Company acquired, succeeded to and thereafter continued until in the year 1930 the said business thereafter conducted by said Colorado corporation under the successive names, Cereal Machine Company and Shredded Wheat Company; that on or about the 15th day of May, 1908, the name of the said Natural Food Company was pursuant to the laws of the State of New York, duly changed to the Shredded Wheat Company; that in the year 1898 plaintiff, National Biscuit Company, a corporation, was duly organized under the laws of the State of New Jersey, and since its incorporation said plaintiff has been and now is engaged in the manufacture and sale throughout the several States of edible products; that in the year 1930, plaintiff, the said National Biscuit Company, ac-

quired and succeeded to the whole of the going business, alleged trade-marks and property of the said Shredded Wheat Company, a New York corporation; that since said plaintiff acquired and succeeded to the said going business of said The Shredded Wheat Company, it has continued and is now continuing to conduct the same throughout the several States and with foreign nations."

THE COURT: Are these so-called admissions necessary jurisdictional facts that you are proceeding to prove by this form?

MR. COOPER: Not so much the jurisdictional facts as the derivation of title from the original Perky enterprise down to and including the National Biscuit Company.

THE COURT: Not so much, but are they jurisdictional facts essential to your case, that you are seeking to introduce in this form?

MR. COOPER: Yes, they would be so regarded.

THE COURT: Are you seeking to amend your bill in this way?

MR. COOPER: Not at all. We averred these facts in our bill. They first deny them, even their own corporate capacity, in their answer, and then to support their affirmative defense they make these averments that I have read to your Honor.

In our reply we admit the truth of the allegations that I have read to your Honor, so that there is no issue upon them at all, but simply because of a little puzzlement on our side as to whether under Rule 30 of the Rules of Equity, we might be considered to have denied these affirmative averments, I am offering them in evidence as an admission against interest.

I do not think it is necessary because under the state of the pleadings, there is no issue raised.

I am offering in evidence these two averments of the defendant.

THE COURT: If it be a document, by whom is it signed?

MR. COOPER: By Kellogg, or by the defendant herein. That is a formal answer. Those are formal averments of the defendant's answer.

THE COURT: I understand the answer. I thought you were tendering something in order that it might appear that these averments were not denied under Rule 30.

MR. COOPER: Yes, I am. Of course, I tendered my reply to that answer. I am tendering those averments from the answer in the first place, as admissions against interest.

THE COURT: Is that the old common law pleading orally in Court?

MR. COOPER: No, this is on the equity side. Like any other document proceeding from my adversary, I can offer it in evidence as an admission against interest.

THE COURT: What are you offering?

MR. COOPER: I am offering those two sections of the answer No. 1 and No. 2, under the heading of affirmative defense in the answer.

THE COURT: It being a pleading and part of the record in the case, you are offering them?

MR. COOPER: Yes, not being certain whether under the Equity Rules it stands as an admission or is itself considered to be denied.

THE COURT: As proof in contrast to pleading?

MR. COOPER: Yes.

THE COURT: Very well. Have you any objection to having your own pleading go in as proof?

MR. CLARKE: No, except, if your Honor please, if it is going to deprive us of the right to see these title documents, I would ask your Honor's permission to withdraw those allegations. I know nothing about them. I will let the pleadings stand in that way without objection, if they let me see the title document. I make demand on them now.

THE COURT: You are charged with knowledge of what you pleaded.

MR. CLARKE: Precisely. I simply asked, and I will not change the state of the pleadings in any way if they let me see the title documents from the Shredded Wheat Company to the National Biscuit Company, otherwise I ask to amend by withdrawing those allegations.

THE COURT: He desires that the documentary evidence to stay in that proof to be tendered.

MR. COOPER: We have not got it here.

MR. CLARKE: They said they can have it here by tomorrow.

MR. COOPER: We said we could have it here, but I did not hear anybody say by tomorrow. We will have it here merely as a matter of convenience to you.

MR. CLARKE: If there is any question about my proving anything as important as the title, I will ask to amend by withdrawing the allegations.

MR. COOPER: After your adversary has acted upon it?

MR. CLARKE: If they will not let me see the title documents, I will ask your Honor to let me amend by withdrawing the affirmative allegations.

THE COURT: As a practical matter, will the documents be available?

MR. COOPER: Yes, we are sending for them now, and as a practical matter, we will try to have them here before the trial is over, and I will assure you and counsel that if they are not here, before the trial is over, we will show them to him anyhow, and if he is not satisfied with what he sees then, he may bring what he wishes before the Court at any time.

I would raise no question of it being untimely if he approached your Honor with a motion in the event that the papers do not get here before the trial is over. I will raise no question if after seeing them subsequently, they not being actually produced here on the trial, he should approach your Honor with some motion based on the fact of something appearing in the papers which he might have raised on the trial. I will not raise the question of it being untimely.

MR. CLARKE: May I except to that for the record?

THE COURT: Yes.

MR. COOPER: I will offer in evidence defendant's answers to all the interrogatories except No. 34. The exception I make is because I think that answer No. 34 is not responsive to the interrogatory. I make the explanation about the long delay in filing them as a reason why it was not taken up with the Court before.

If your Honor please, they are referred to both in the complaint herein, the bill of complaint, and in the defendant's answer, four certificates

of registration in the United States Patent Office. They are identified fully in both sets of pleadings, and I want to offer those four in evidence. They might, I think, as a matter of convenience, go in as a single exhibit. I will specify what they are. They are numbered——

THE COURT: You offer the interrogatories and the answers save one?

MR. COOPER: Yes.

MR. CLARKE: The defendant will offer the other answer.

MR. COOPER: What its effect will be, I don't know. I do not think he can offer affirmative proof of his own answer. It is a self-serving declaration and not strictly responsive that I omitted it.

I will cut this Gordian knot, that my brother is raising so frequently in his effort to get out of things that he has done formerly by offering the whole set of answers to interrogatories as well as the interrogatories themselves, and moving to strike out as perfectly improper the answer to the Interrogatory No. 34, and ask your Honor to rule on that with the other things in the case. I do not think it would be necessary to take it up at this moment.

Now, I will offer in evidence as a single exhibit the four United States registered trademarks to which I was referring, a moment ago, they being No. 85,186, registered January 3, 1912, and that one being a trade-mark which shows a bowl with a wheat biscuit in it and some milk or the like, and the second one being——

The second one in the exhibit is trade-mark No. 216,593, registered August 17, 1926, and that shows a saucer with two wheat biscuits in it, the thing that has been so familiar from these exhibits as being depicted.

The third is registered trade-mark No. 178,725, registered under the act of March 19, 1920, on the words "Shredded Wheat," it having been registered on January 15, 1924.

The fourth is trade-mark No. 213,456, registered under the same act on May 25, 1926, on the same words, "Shredded Wheat."

The difference between the third and fourth of these trade-marks is that the fourth applies the words to a greater variety of substance than does the one immediately preceding.

THE COURT: For every appropriate purpose they are admitted.

MR. CLARKE: May I have an exception?

THE COURT: Certainly; let an exception be entered.

(Received in evidence and marked "Plaintiff's Exhibit No. 252.")

MR. COOPER: I now offer in evidence certificates of registration of the name "Shredded" as a trade-mark in the State of California, Colorado, Connecticut, Delaware, Illinois, Indiana, Iowa, Louisiana, Texas, Maine, Maryland, Massachusetts, Michigan, Missouri, Minnesota, Nebraska, New Hampshire, New Jersey, New York, North Carolina, Oregon, Pennsylvania, Tennessee, Vermont, Virginia, West Virginia and Wisconsin.

With the admission of my brother on the other side to whom I have submitted them, I use photostatic copies in place of the originals, the originals all being here, and I can offer them all as one exhibit, on the front of which is a list of the various states and their identification mark.

(Received in evidence and marked "Plaintiff's Exhibit No. 253.")

MR. COOPER: That, if your Honor please, is the plaintiff's case.

PLAINTIFF'S WITNESSES.

EDWIN L. WALLACE.

Deposition taken in New York, August, 1932.

DIRECT EXAMINATION.

THE WITNESS: My name is Edwin L. Wallace and I am 56 years old. I have resided at Welwyn Garden City, Hertfordshire, England, since 1924, where I am employed by The Shredded Wheat Company, Limited. I have been connected with the business of shredded wheat since 1896, when I received my first employment at Worcester, Massachusetts, with The Cereal Machine Company. The principal person connected with that company was Mr. Henry D. Perky, whom I knew from 1897 on, until he severed his connections with The Shredded Wheat Company. Mr. Perky is dead. He died about 1903-1904.

I was first employed on a production table as a panning and peeling man, putting the shredded wheat from the boxes in which they were made on to the trays for baking. I was employed by The Cereal Machine Company until 1901, and I think the name of the company was changed to The Shredded Wheat Company and then to The Natural Food Company. My next employment was in the machine shop working on the construction of a new automatic shredder and panner machine.

When the company moved to Niagara Falls in 1901 they commenced business under the name of The Natural Food Company. The plant at Worcester continued to run for about a year afterwards, until it was closed, and all the production was transferred to Niagara Falls. I installed all of the production machinery on the second floor of the Niagara Falls plant, except what was installed on contract by other people.

We made our first shredded wheat at the new plant in August, 1901, and we had four complete machines running. This plant is still producing shredded wheat. After the Niagara Falls plant started I carried on there as production foreman until the end of 1904, when I was given charge of assembling a plant which was to be started in Ontario, Canada. We started operations at the Canadian plant in January, 1905. I continued on there as factory superintendent until I was sent to England in 1924, where I had charge of the building of the plant, installing the machinery, organizing the force and getting the plant in running order. We made our first shredded wheat in England in 1925 and I have been with that factory ever since in the capacity of managing director, which puts me in charge of all departments, including sales and production. I assisted in a general way in the construction of other plants at Oakland, California, and Erie Avenue plant at Buffalo. Thus, I have been continuously connected with The Shredded Wheat Company and its predecessors since 1897 and engaged in actual and practical operation in the capacities stated. During that period of years I have become thoroughly familiar with all the processing and manufacture of the shredded wheat product.

Operations of the plants have been continuous since I have been connected with the company except for periods when they were overstocked. I was personally connected with the development of machinery that is used today in the manufacture of shredded wheat.

When I first went with The Cereal Machine Company the product of the company was called "Shredded Wheat."

The shredded wheat biscuit that is manufactured now is practically the same in appearance and constituency as the biscuit that was manufactured in 1898.

MR. VILAS:

Q. 96. P I, page 14. Is it true to say that that product, as produced today by the shredded wheat factories of the plaintiff is, in all respects, substantially the same as that produced in 1898?

A. It is.

Q. 97. That is, in size, shape, appearance, and contents?

A. Yes, yes and in weight.

Q. 99. Has it always been put in the same sized package?

A. Yes, 12 biscuit in a package.

Q. 100. What is the shredded wheat biscuit composed of?

A. Fibres or filaments of whole wheat, I should say.

Q. 101. Does it contain anything else?

A. No.

Q. 102. Is anything added to or taken away from the whole wheat kernel or berry in the manufacture?

A. No, it is still the whole wheat in the finished product.

Q. 103. Has that always been true?

A. Yes.

Q. 104. From the beginning of your connection with the company?

A. Yes, it has always been the same.

THE WITNESS: If any changes have occurred in the process of manufacture they have been in the nature of improvements in the machinery to produce the biscuit.

The general process of the manufacture of shredded wheat as it was carried on in 1898 is as follows:

The wheat was received in bags and stored until use, when it was subjected to about five or six different

processes of cleaning. It was then cooked by boiling it in a tumbler or drum immersed in boiling water for about ten minutes; then drained and lifted into wire bottom trays, which were covered with a cotton sheet. It was next turned by hand or with paddles about twenty-four hours until it was cured or in a condition for shredding. It was then shredded with rolls practically the same as those in use at the present day.

In the process of shredding the whole wheat kernels which had been previously cooked and cured were drawn between these rolls, one of which was full and the other grooved. The rolls were subjected to a considerable pressure, which drew this wheat out into filaments or fibres, which have always been known as shreds, although, in reality, technically, I suppose they are not shreds; but shreds and shredded wheat are names that have been connected with it ever since I can remember. (Page 18.)

The wheat is more pressed than cut, although the grooves are sharp. The pressure seems to string them out into shreds, and the berries or kernels of wheat blend into each other, so that there is more or less a continuous thread in the groove. We have often taken a thread two or three feet long, composed of one kernel of wheat, blended into another and so on.

The finished product shows the bran broken up on the shred. If you look at one of those biscuit you could distinguish particles of bran and a little grain of starch on the outside of the shred. Although I cannot give a chemical analysis offhand, the wheat berry is composed of starch fibre, bran and what is known as the middlings, which is taken off in flour. All these are pressed out by what we call the shredders.

There were 36 pairs of rolls in the complete shredding machine at that time (1898) and about 32 sets were in use. The depth of the groove ran from fourteen to eighteen thousandths of an inch. Each pair of

rolls deposited its quota of shreds in a series of boxes that passed under the rolls and then the biscuit were in turn cut by an automatic knife; the boxes were then drawn out on to what they call the peeling bench.

These 32 sets of rolls were disposed in a line and each one deposited its filaments or shreds in the boxes that rode on a leather belt, so that after a box has passed underneath the 32 shredders it contained about 32 layers of filaments.

Thus the nature of the process was to pile up a longitudinal pile of layers or shreds and when it got on the table it was drawn into a pressing or cutting machine that shaped the biscuits and cut them apart in the box. They were then peeled with wooden peels from these boxes and laid on the pan.

A peel is a little instrument probably 8 inches long, about 4 inches wide, made of wood, with a little handle at one end. It is a kind of shovel which is shoved under the shredded wheat biscuits whereby they were picked up from the table and deposited on the pans.

The constituency of the biscuits at the time they were put on the pans ready for the oven contained approximately 46 per cent. moisture.

The pans were put on racks and the racks were taken to the oven room. After baking they were again put on racks and the racks were run through evaporators or drying chambers, which removed any moisture which might remain after baking. In the evaporator the moisture was reduced to about three or four per cent. In 1898 it used to take about 35 minutes to bake the biscuits in an oven of about three to four hundred degrees. They were in the evaporator about an hour and as soon as the biscuit were cooled they were ready for packing.

Between this time and the present day there have been improvements and refinements in the mechanical

process of making the biscuit. In 1898 an automatic shredding, cutting and panning unit was built but that machine was discontinued after several months because of the high amount of waste connected with it and a new machine of the same type was developed, which is substantially the same as is in use in the factories today.

In the Erie Avenue Plant at Buffalo, New York, and in the Canadian plant there is now an automatic machine which has been developed after about 18 years of experimental work and study. This machine automatically shreds, cuts, pans, bakes, evaporates and then delivers to the packing table; thus this new machine eliminates a great deal of the old hand labor and it is no longer necessary to use peels. All of the factories are still using some of the old system but this automatic machine is used in addition to the old units.

As for the treatment of wheat today—the wheat instead of coming in bags is received in cars in bulk, approximately 1800 or 2000 bushels in a car, which is handled by a car shovel and unloaded very quickly.

The cooking process is very different from the old slow tumbler and Kettle. It is now cooked in a steel drum with a perforated metal tumbler or inner compartment, and it is cooked under steam pressure. The old style of doing it was simply to boil wheat by immersing a tumbler full of raw wheat in boiling water.

Before the wheat is cooked it goes through nine processes of cleaning so that by the time it is ready for cooking, foreign matters such as straw butts, unthrashed wheat, cockle, mustard seed, black or wild oats, barley, peas, beans, corn, lumps of dirt and stones have all been removed.

As for the shredding apparatus, there has been substantially no change and all the shredders work exactly as they did in the original process.

They are now baking the biscuit at 500 to 550 degrees F. in a period of 15 to 20 minutes. The evaporation process takes about fifty to sixty minutes.

The rolls used today have coarser grooves, which run from twenty to twenty-four thousands of an inch deep, and the number of sets has been reduced to 29 for the reason that the deeper groove produces a lighter and more porous product and enables us to shorten up the machine from 36 to 29 sets of rolls. There are twenty grooves on a roll, which is the same today as it was in 1898.

In the first cleaning process there is a combination of perforated screens and air suction which removes the straw butts and raw offal. The wheat then goes through a milling separator with about six different types of screens which further separate foreign substances. It next goes through a scouring process whereby brushes brush the dirt from the outside of the berry. Next the cockle cylinders, a disk machine, remove the cockle and broken kernels of wheat. Then there is a set of stoning or gravity machines which remove stones by a shaking motion which cause the heavier material, such as stones, to climb to the high side and drop off and the wheat to drop off the low side.

Pure white wheat is the best for shredded wheat. It is difficult to get a pure white wheat in Canada or in the United States—it is more or less red or amber. We used to get the bulk of the wheat from the Genesee Valley, some from Michigan and some from other parts of the United States. In Canada it was nearly all Ontario wheat.

In summing up, I would say that the essential product and the essential steps of the actual manufacture of the product are the same today as they were in 1897, with the exception of the improved methods.

Shredded Wheat could be made in many different designs and produced in commercial quantities.

Each year the amount of shredded wheat produced has increased.

I believe that the average individual, when shredded wheat is mentioned, immediately thinks of the shredded wheat product that is produced by The Shredded Wheat Company.

The question was objected to as incompetent, irrelevant and immaterial.

(The witness was now shown several volumes containing carton samples that had been used in the past and was asked to identify him.)

THE WITNESS: I recall the use of the representation of the dish on page 19-A of Volume 1 of Plaintiff's Exhibit 2, which has been used for a great many years and as early as 1908. I also remember the picture on the cartons of a dish containing two shredded wheat biscuit. This picture of the biscuit in a dish has been used for considerable time in our American, Canadian and English plants. As a matter of fact we have a gift scheme in England where we give premiums to customers who return a certain number of these dish pictures from the cartons.

Shredded Wheat will keep almost indefinitely if it is kept dry.

CROSS-EXAMINATION.

THE WITNESS: The rolls which make the shreds coarser are used both in England and the United States at the present time. There has not been any lessening or refinement of the shreds in the United States in recent years, although the shreds that are laid on the bottom and on the top may be finer in order to make a better appearance. Also, the rolls with the deeper grooves do not wear out as quickly as those with the

shallow grooves. We have conducted experiments with these cases in mind—wearing qualities of the roll, improvement of the roll, improvement of the biscuit and regulation of the weight of the biscuit.

Shredded wheat is registered as a trade-mark in England.

In our new automatic ovens biscuits are browner on the bottom because they are baked on perforated, heavy metal pans rather than wire pans. The metal pan holds the heat and browns the bottom. Thus, some of our biscuit which are on the market may have darker bottoms than others, which are baked on the wire pans. The biscuit may also vary a little in shape, depending on the weather and the quality of the wheat, that is, some may have round bottoms while some may have flat bottoms. This is an accidental variation.

In the past we have had small demonstrating machines set up in store windows which made small Shredded Wheat biscuit. These, of course, were for demonstrating purposes only and most of the resulting biscuit was given away.

I have been familiar with the Kellogg biscuit since around 1920, when they were manufactured with ribbons rather than shreds and were made from dough. As for the present day Kellogg biscuit, I have not noticed it to any great extent, except that it is shorter in length, and I did not pay any attention to them because they have not entered our territory.

Our advertising department has requested us to use the picture of two biscuit in a dish rather than the one biscuit as they feel that will induce people to eat two biscuit instead of one.

I would say, as I have before, that our biscuit has been substantially the same as it has always been, except for changes in the size of the shreds which the consumer would not notice.

EDWARD EVERED SWEET.

Deposition taken in Providence, Rhode Island,
September 7, 1932.

DIRECT EXAMINATION.

WITNESS: I reside in Cranston, Rhode Island, and am 46 years old. I have never lived in Wilmington, Delaware, nor within 100 miles thereof except that I at one time lived in Philadelphia.

The article which counsel takes from Plaintiff's Exhibit 1 I recognize as a biscuit called shredded wheat. I have been familiar with that, if my memory serves me right, since 1915. Since that time I can not remember any changes in the form of the biscuit. It is the same now as I have always remembered it in form and appearance because I have been eating it as long as I knew it. I can not remember any change in taste either.

The first experience in ordering shredded wheat in restaurants that established itself in my mind because of any unusual circumstances was on St. Patrick's Day, 1932, at breakfast at the Biltmore Hotel, Providence. I ordered a shredded wheat from the menu in the Providence Biltmore Hotel in their lunch room.

Yes, at the Providence Biltmore Hotel, in their lunch room; and a small package, such as might indicate that it was an individual package—or at least two biscuits were exposed during delivery of the food; and, because I was dividing my attention between the package and a newspaper, I just automatically removed one of the biscuits, as I always do when I receive an individual package, and started to eat it. Eating two or three portions convinced me that there was some sort of change in the biscuit, so I paused in my reading long enough to examine the package more closely; and I discovered that it was not shredded wheat, but that

"it was a product known as Kellogg's Whole Wheat Biscuit. That, of course, indicated to me why it might be different from the shredded wheat that I had been eating.

The suggestion that I got was that it was hard to chew. My first impression was that I must have a very old shredded wheat biscuit. That is what caused me to look at it and examine the package, and then on more close examination it seemed like a shorter biscuit.

I called the waitress and, if my memory serves me right, I said to her: "This is not shredded wheat."

And she said: "What is it?"

And I said,—if I remember correctly, "This is Kellogg's Whole Wheat Biscuit."

"Well," she said, "they have sold out to the National Biscuit Company."

I had asked the waitress for shredded wheat, and no more. I had a similar experience at the same place on August 11, 1932, when I again ordered shredded wheat in the lunch room from waitress No. 172, and I wanted particularly to see what was delivered to me. On that occasion she delivered to me an individual package of Kellogg's Whole Wheat Biscuit. I identified the package by a mark I put on it and I asked her specifically not to open it because I wanted to take it out. On the previous occasion the package had been opened at the top, exposing two biscuits.

(The package referred to was received in evidence and marked "Plaintiff's Exhibit 5.")

WITNESS: In the March 17th experience I can not say what side of the package was toward me. I did say that the top of the package was open to expose the ends of the biscuit. In other words, I presume it was served that way for convenience in removing the biscuits. I did not have to open the package. It was open so that the ends of the biscuits were visible from the opening.

On August 11th I again asked the waitress for shredded wheat, and after the package was delivered I asked her if that was the only kind of shredded wheat they served at the Biltmore Hotel and she said yes. I then reminded her that that was not shredded wheat and I distinctly called her attention to the fact by referring to the package and that it was Kellogg's Whole Wheat Biscuit. She then said that that was the only kind of shredded wheat they carried. In that instance my order was written in full and I signed my name on the back of the card and left it with the cashier.

On September 2d, 1932, in the afternoon, I again ordered shredded wheat from waitress No. 177. She delivered and opened a package of Kellogg's Whole Wheat Biscuit. I ate the biscuit and then told the waitress that I would like a copy of the receipt. She arranged for a copy on a blank sheet of paper. I wrote the number of the check from which it was copied in the lower right-hand corner and signed it.

(Slip received in evidence and marked "Plaintiff's Exhibit 6.")

WITNESS: I produce the package delivered that day with my initials "E. E. Sweet, 9/2/32" written in pencil on the end of the package.

(Package received in evidence and marked "Plaintiff's Exhibit 7.")

WITNESS: On September 2d I ordered from the menu and retained the card, which I produce, with a circle around the words "Shredded Wheat Biscuits". I had seen the same item on the same menu several times before.

(Menu received in evidence and marked "Plaintiff's Exhibit 8.")

WITNESS: I recall having lunch with counsel at the Biltmore on September 1st, 1932, when counsel ordered shredded wheat. Counsel called my attention to the fact that the waitress wrote the words "Shredded Wheat" and I remember that I received Kellogg's Whole Wheat Biscuit in an individual package containing two biscuits, served with the top opened and counsel called the attention of the waitress, No. 172, to the fact that that was not shredded wheat.

At that time, she was rather surprised to think that it was not and asked you (counsel) to look on the package and see if it was not manufactured by the National Biscuit Company, following which she inserted a fork in the package and removed one of the biscuits to show counsel that it was shredded wheat in appearance.

I remember, further, that counsel again called her attention to the fact that it did not say anything about Niagara Falls or shredded wheat on the package and again called her attention to the fact that that particular product that she was showing him was made by Kellogg at Battle Creek, Michigan.

(Carton received in evidence and marked "Plaintiff's Exhibit 9.")

WITNESS: Since 1915 I have been employed professionally with sales and sales management of cereals, dairy products, canned goods and soaps. In 1915 I was employed by W. K. Kellogg Company at Battle Creek, Michigan, and severed my connection with them in 1919. In 1915 I was engaged at Chicago to peddle samples for them from house to house. In 1916 I had charge of their sample operations at Chicago. They later sent me to represent them at Peoria, Illinois, for the Peoria district as a salesman. I served them in that capacity until the conclusion of my services. During that period the Kellogg Company had a product that they called Kellogg's Wheat Biscuit. I did not

then, nor do I still, consider that biscuit in any way in conflict with shredded wheat. It was flat and rather hard. It was packed side by side in a long package. I do not recall how many in a package but it was smaller than the biscuit they now make. It was made of whole wheat but I have never seen the formula. It was sold as and for a whole wheat biscuit.

In the course of my work with Kellogg Company, I visited the trade, both wholesale and retail customers, particularly after I was appointed to the Peoria district. Before that I was concerned mostly with sampling but during the period between my original engagement and the final assignment to a permanent territory, they used me on the Chicago trade. In the Chicago trade the company was more particularly concerned with cornflakes exclusively. My first memory of the biscuit is concerned with the first convention I ever attended in 1917 or 1918 at Battle Creek, composed of salesmen that had not previously been to Battle Creek, some district managers and the heads of the sales organization. At that time I knew shredded wheat biscuit very well. I had seen them on the trade and I had eaten them.

I recall that a portion of that convention was devoted to the sales opportunity for Kellogg's products; and in that particular discussion, the men in charge of the subject specifically related to the opportunity for the Kellogg biscuit by indicating the tremendous volume that was enjoyed at that time by shredded wheat. Shredded wheat certainly enjoyed a splendid territory and splendid distribution—I should say nearly complete distribution so far as the retail trade was concerned. In selling the Kellogg Whole Wheat Biscuit after that convention it was necessary to expose it to the trade at the time that we tried to sell it to them. We had to do that to indicate its character. We had to tell them about the profit. We made comparisons between

the profit that was present in our biscuit and profit margin which we believed was present on shredded wheat. We went through the usual motions of demonstrating it by allowing them to taste of it.

Very often when we were presenting this product for the consideration of our retailers they would make the comparison that it was similar to shredded wheat. I was always very careful not to create the position that we wanted to make that kind of a comparison at all.

We did, however, guarantee the sale of the biscuit. We definitely told our trade that, if they could not sell them, as soon as we had satisfied ourselves and them that there was no place in their particular trade for it, we would refund the money that it had cost them so that it would be no loss to them.

I personally removed a good deal of the distribution that I obtained later by actually buying back the products from the retailer at the price they had paid the wholesaler for it. It was quite natural that, in our contact with the retailer, we made every effort to obtain their good will and interest for the product; but we naturally solicited their patronage of the product, and, by every ethical method, we endeavored to get their support for the product in the trade and make it move.

I would not say that the product actually competed with shredded wheat distribution. It was not successful in distribution in my territory.

I made daily reports to the company of sales and market conditions comprising the towns that we had covered during the day. They comprised the record of the distribution that was present in the retail stores concerning the products that we had to sell; and they also comprised a record of competitive products and also comprised our estimate of the division of sales of the different products. These reports were all on stan-

standard printed forms with places to report the sales of various Kellogg products by name and blank spaces for inserting matter referring to competitive products. I very definitely referred to shredded wheat in comparison with Kellogg biscuit sales. In some parts of the territory where we had no biscuit sales we used Krumbles for comparison in making shredded wheat sales.

After I left the Kellogg Company, I went to the Armour Grain Company as salesman at Milwaukee and later was assistant manager of bulk cereal division at Chicago. Later they sent me to Philadelphia to assist their district manager. That was for approximately 2 years and then I was appointed general manager of the Canadian Rit Dye Soap Company, at Toronto, Canada, in 1921. That was a job of reorganization which required only approximately 6 or 7 months. Following that I joined the Post organization, that is, the Post Products Company at their New York office and in that capacity I was employed in general observation of their entire field of sales procedure. My opinion was solicited concerning field campaigns, advertising, the general condition of their sales organizations. That was entirely cereals. I remained there until 1924 when they went into General Foods and I was sent into the field for observation and sales direction.

Finally, in 1925, I was placed in charge of the brokerage end of the L. W. Pennington business at Portland, Oregon, in charge particularly of the General Foods contacts which were handled out of that office. I continued in that capacity until February, 1927, at which time I became merchandising manager of the Western Dairy Products Company at Seattle, Washington. I had sales direction also of the California dairies at Los Angeles and in 1928 became president of their subsidiary, the Dutch Chain Stores, at Los Angeles, concluding that connection August 1st, 1929.

On August 3d, 1930, I joined the H. J. Heinz Company of Pittsburgh, in connection with their chain store operations, requiring coverage of all national contacts such as their own branches, concerning my contact entirely with the grocery end of the business, and that position was later changed to an attempted development of their cellulose program. That concluded February 2d of this year. Since then I have been in the care of doctors at Providence and Pittsburgh.

I feel that since 1915 I have been more competent regarding cereal products and distribution because of my experience which has been largely with cereals. It included all the cereals manufactured by Kellogg during the period I was with them; all the cereals manufactured by the Armour Grain Company during the period I was with them; and all the cereals manufactured by Post Products and later General Foods while I was with them; and the cereals and distribution and under development by H. J. Heinz in Pittsburgh.

I certainly have had an education in cereals that would probably permit me to be more critical than the ordinary consumer. For that reason, I am probably very critical of the cereals and the comparisons that I make when I select them and eat them. When I find a biscuit like that in Plaintiff's Exhibit 1 I can not think of anything but Shredded Wheat. When I think of Shredded Wheat the thought I get is concerned entirely with the product manufactured by the National Biscuit Company at Niagara Falls.

Prior to March 17, 1932 I had not seen this particular Kellogg product and did not know of its existence. During my experience in the cereal business, we kept ourselves constantly informed of products of a cereal nature regardless of whom they were manufactured by in order that we might make comparisons, but in those years I had never seen the Kellogg's

new Biscuit until my contact with it at the Biltmore Hotel.

As to the effect upon the ordinary consumer who orders shredded wheat at a restaurant or at a grocery store and receives Kellogg Whole Wheat Biscuit, I think that would depend a good deal upon the consumer. The consumer today, I think, is pretty well advised of the structure of the products that they order from a grocer. I think that is primarily the reason they order these products: They know what they want, and they know what they are going to get.

Assuming that Kellogg's Whole Wheat Biscuit is served out of the package in a restaurant without accompanying identification of the package, I think it would pass very acceptably as shredded wheat. When a customer or member of the general public asks for shredded wheat, my understanding is he expects to receive Plaintiff's Exhibit No. 1. The term shredded wheat is connected very much in the public mind with the Niagara Falls product and I think that situation has been built up through the medium of their advertising. I think that Niagara Falls and Shredded Wheat and the Shredded Wheat Company are particular factors in the identification of the shredded wheat product in the minds of the public, and in the minds of the distributors.

I have had experience in dealing with retail store keepers throughout the country and I know their reactions and the methods of sales dealing with them. I think it would be very hard work for a salesman to properly demonstrate the taste, appearance, method of packing Kellogg's Whole Wheat Biscuit and properly compare it with any other product that might exist in a similar field, if I were a retail dealer, without making me conscious of my investment in shredded wheat. I do not think he could do it without making me conscious of the fact that if I purchased it I would necessarily expect to split the volume of that char-

acter of cereal between the two products. In my opinion, the retail trade has, for the period of time covered by my experience, been familiar with the shredded wheat as a sort of yardstick of that sort of cereal.

CROSS-EXAMINATION.

WITNESS: At the time this individual package of Kellogg's Shredded Whole Wheat was put before me, if I had not been reading the paper and I had looked at the package in the beginning, I certainly would not have had this confusion of it if I had examined it. I do not say there was similarity between the packages but that it is that characteristic that I had become accustomed to: the similarity of the two biscuits. There is no comparison between the containers. I am talking about the identification on the side of it. So, if I had not been reading the paper, I would have seen instantly that the Biltmore Hotel was serving me another kind than that which I had been accustomed to get.

As I recall now, it was on my second visit that the waitress told me that they only handled the Kellogg product. I naturally asked for shredded wheat because that was my preference. I made no complaint about it. I think they were very truthful to say they handled only the Kellogg product. I have proved it. When I saw shredded wheat on the menu, I certainly thought that they might handle it. What I saw on the menu was Shredded Whole Wheat Biscuits.

This is the first statement under oath that I have made about this but I sent a letter to Mr. Lowry and all correspondence since has been with Mr. Vilas. The occasion of sending the statement to Mr. Lowry was nothing more than amusement. I am always amused by any confusion, especially in the cereal line, because I have been concerned with cereals; and almost everybody who has been concerned with cereals during my

history is an acquaintance of mine, some of them very close acquaintances.

My confusion was not from looking at the packages but it was the possibility to me that it was not shredded wheat and the difference was first made conscious to me by the taste, or rather the difference in the chewiness of it. It seemed hard to me. It seemed different for that reason. I did not examine the biscuit as to baking on top and bottom for the reason that I have no history that tells me that that is characteristic of either biscuit.

As I detected this difference, I looked at the carton and as a cereal man, or in my capacity as an ordinary consumer, I knew that I was getting a product of a different carton. I would like to add also that in writing Mr. Lowry originally, I did so without intending any unkind notion. In writing Mr. Lowry, I was merely commenting on a situation that existed that was comparable to the many such situations that I had to handle and guard against when I was with Kellogg, from the start. One thing that we fought desperately against when I was with Kellogg was substitution. That has always been a vital consideration with our organization, with every organization that I was with, to avoid substitution. Consequently, I have performed that same service in defense of my own position and in defense of the Kellogg Company when I was connected with it; and, in making that motion to Mr. Lowry, I had not in any way anticipated that it was in any way possible that it would be used as testimony. I think that my own letter would indicate that it was done on the basis of amusement.

The basis of my amusement was that Mr. Kellogg's product was in the position of being substituted for that of somebody else. I did not hear from Mr. Lowry but subsequently heard from Mr. Vilas asking me if I would care to give testimony.

I constantly asked for shredded wheat at the Biltmore because it is a cereal that I am eating for a specific reason right now. I have never gone into the Biltmore Hotel or any other hotel for some time past without, if I was concerned with eating it for that particular meal; asking for shredded wheat. So that is a constant practice of mine. I think the Kellogg product which I received at the Biltmore Hotel is a distinctly shredded product and I do not mean to imply that it is not a wheat product. That is claimed for it on the outside of the package. I know that the Kellogg organization would not sell anything that they did not cover on the outside of their package. I distinctly told the waitress that it was not shredded wheat; and the connection between that and her observation is a connection that I think is quite vital to you and to the National Biscuit Company. It has been a practice ever since I have been a cereal man to ask for shredded wheat meaning the food that is in that exhibit (Plaintiff's Exhibit 1). When I said to the waitress that it was not shredded wheat, I meant that it was not Shredded Wheat made by the Niagara Falls Company. I did not have any thought about the Kellogg Company or National Biscuit Company or its product when I talked with her except that I wanted to make the comparison that the product that had been manufactured by Kellogg at Battle Creek, that was the Kellogg's Whole Wheat Biscuit, was not Shredded Wheat, meaning the one manufactured at Niagara Falls; not when I was identifying it by its distinctive name; but if that was served to me, not being this product, that was served for this product, being another product. I merely took it upon myself to tell the waitress that it was not the Niagara Falls shredded wheat, but I did not mean to say that it was not what it said on the package. It contained what it said on the package. It says

"Kellogg's Whole Wheat Biscuit" I showed her the package.

If I asked for corn flakes I would expect to receive Kellogg's Corn Flakes. There have been many other brands of corn flakes. If I had asked for Kellogg's Corn Flakes and received some other brand of corn flakes, I certainly would have complained that they were not the corn flakes that I hoped to get. I very likely would have told the Biltmore that those were not Kellogg's Corn Flakes. If I were eating constantly at the Biltmore, I would tell them, and I have done that to many hotels and restaurants in the United States when I wanted corn flakes, that I wanted the best corn flakes, meaning Kellogg's.

I did not join Kellogg's until 1915 but I had been a consumer of corn flakes for five or six years previously. I had never seen the Kellogg biscuit until my contact with it here in Providence. Yesterday I got it at the Providence Biltmore. Whatever I have had to say to them has not had the effect apparently of their purchasing the other, or rather serving the other, to me. All I am interested in is getting Shredded Wheat when I ask for it. I do not think what I did injured the Kellogg Company.

As a salesman, I do not see any reason why, in selling Shredded Wheat, or in selling Kellogg's Whole Wheat Biscuit, why their salesmen, for either product, has completed his job if he does not make it clear to the man that he sells it to that, if he wants to get the utmost from either product, he should distinguish those two products on his menus.

Further, I do not think that any salesman is doing his job, on either product, when he sells it to a hotel or a retail dealer, unless he also sells the idea with the product that the buyer is not going to get at all a view of the difference between those two products, unless he distinguishes between those two prod-

ucts and ties it into the advertising of both the organizations.

And, if that had been properly done by the salesmen, so far as the Biltmore was concerned, if that job had been carried out properly, both items would show in exact relation to the package identification, on the menu, and there would be no confusion between the Kellogg biscuit and the shredded wheat on the menu, if both items were written as they are identified on the package and their appearance on the menu, so that when the consumer looked at that menu, he would know that there were two products available and he could make his choice between them.

There is nobody—and particularly, I am not concerned with how much Kellogg's Shredded Whole Wheat Biscuit the Biltmore may sell, nor do I care how much Shredded Wheat the Biltmore may sell. The only question is that, if you ask for shredded wheat and you do not get it, you certainly have a right to say that you are not getting what you asked for. That is my interpretation of the sales position of the two products; and the Biltmore Hotel—so far as any motion that I have made or any motion that I have seen anybody else make, it is certainly not intended to disturb the sale of your product.

The motion has been made to secure proper identification and proper delivery of the products, as they may be ordered in that hotel.

I think a hotel like the Biltmore should put on their menus that they carry only one brand of corn flakes, or that if they do carry several brands, they should mention them all. It would be to their advantage to do it. That is, from the standpoint of identification to the customer. When they order it, they know exactly what they are buying. The customer might not like Jersey Corn Flakes and he might take your Whole Wheat Biscuit in preference; whereas, if

they had your corn flakes and Shredded Wheat Biscuit, they might, conceivably, prefer your corn flakes. What I was concerned with in connection with the Biltmore Hotel was that when I ordered Shredded Wheat Biscuit I did not want Kellogg's Whole Wheat Biscuit. I do not claim that as a consumer I was particularly acquainted with the shredded wheat situation when I saw this first package of Kellogg's Whole Wheat Biscuit, but I absolutely claim that it was the first time I had any contact with it or ever heard of it.

I could be quite familiar with shredded wheat, as I think of shredded wheat made by the Niagara Falls Company; but it is very possible that Kellogg could have his new biscuit in different parts of the United States and still not have it in distribution in any stores where I might come in contact with it or where my wife might come in contact with it or buy it so that I may become acquainted with it.

So the basis of my feeling that I knew something about the shredded wheat situation would be my own personal contact with Shredded Wheat or what I might have heard and what I might have come in contact with, and with advertising.

I was not closely enough connected with the Kellogg organization to know that they put out a shredded wheat biscuit or advertised it as such for some years before I heard of it.

Whenever you say Shredded Wheat to me, I can not think in terms of anything but the product made by the Niagara Falls organization. I think it would be possible that I could overlook entirely the fact that the Kellogg Company had put out on a national scale shredded wheat biscuit. I never saw any advertisements of Kellogg's shredded wheat until I encountered the product, then I saw advertisements in a window in Providence. I can not recall any advertising that I had previously seen put out on Kellogg's bis-

cuit; but my interest was stimulated after getting the product by seeing advertised in a grocery store a day or two after I had eaten the biscuit that product, and that led me to believe that Kellogg was instituting a definite advertising program on this biscuit. It occurred to me that it must be.

I was particularly convinced by the window display that they were putting out a biscuit, a shredded wheat biscuit. I did not investigate as to what its contents were; but I was convinced, after seeing the window display, that they were putting out a biscuit, and that they were different than anything I had seen before, other than the contact in the restaurant.

I would say that they were giving their biscuit very definite and wide publicity.

It has been my purpose, whenever I asked for shredded wheat, to try to get the product made by the organization at Niagara Falls and if the time comes when I want Kellogg's Whole Wheat Biscuit, I will specify it as Kellogg's Whole Wheat Biscuit.

(Letters produced by the witness received in evidence and marked "Plaintiff's Exhibits 1, 2, 3A and 3B.")

WITNESS: I think if the procedure I suggest were followed in every place where Kellogg's product is distributed, it would help the sales of the Kellogg product, if the distinction on the packages were carried on to the menu; and I am quite certain that is just what the Kellogg organization wants the salesmen to get for them.

I have not had any instructions from Mr. Vilas. Everything that I have done since the day of my first letter to Mr. Lowry, in connection with the National Biscuit Company, has been done in accordance with the teachings that I received when I was with the Kellogg organization. If I have done anything for the

National Biscuit Company that is valuable to them—I mean by that that is valuable to their local sales force—if I have given them any thought that puts their local sales force in a situation that they are able to help on their sales, then I have voluntarily contributed something that has been developed for that reason and for that reason alone; and I have done it many times for your organization, and that is where I learned to do it.

Well, I certainly am a free lance; and I certainly have not expected that the National Biscuit Company was under any obligation to me, when I made it possible for them to supply a product or, at least take steps to supply a product that they manufactured, that I was trying to buy at some place in Providence.

If they can put the National Biscuit product, Shredded Wheat, where I can get it when I ask for it, that is all the compensation that I expect, and it is all the compensation that thousands of people expect when they write to your own organization or to any other cereal organization in the United States under similar circumstances.

I have seen thousands of letters from consumers who have tried to buy products manufactured by the different organizations for which I have worked, asking us where they can buy it or if they will please provide it through certain dealers, so that they can get it there.

I do not think my action would be effective to try to force a hotel to throw out the Kellogg biscuit and put in the Shredded Wheat. I was not in touch with the manager of the hotel in any way.

I am not now employed and I left the Kellogg Company because I had a better opportunity with the Armour Grain Company. They paid me more salary to go to Milwaukee for them and increased my salary to come to Chicago for them. I solicited the position while I was still employed by the Kellogg Company.

Every night before I go to bed the last thing I eat is a bowl of shredded wheat, meaning this Shredded Wheat. (Plaintiff's Exhibit 1.)

Before February 2d, 1932, I was not a constant consumer of shredded wheat, but I have been a cereal consumer for a great many years. Shredded wheat and half and half is the dish of my preference because I like the taste and find it agrees with me. I have been eating the Kellogg product at the Biltmore right along. In this instance I bought the package, not intending to eat it there, and I told them so when I bought it, referring to Exhibit 5. I consumed the Kellogg product but it was not the product that I asked for when I got it; there is certainly nothing the matter with any of the Kellogg products that anybody should find disagreeable. My relations during the period of my employment by Kellogg were very cordial. I have always continued with a very high admiration of their products.

I would not say that there is some one leading brand of cereal which should have the right to exclude the service of any other products when they are called for by that name; but I certainly think hotels are doing themselves an injustice if they do not identify the brands of cereal they serve. I would say that if I ran the smallest hotel in the world, if I put a menu before my trade, I would brag about the lines that I carried. If I carried five brands of corn flakes, I would certainly put them all on the menu and I think the Biltmore is really missing an opportunity when it does not do that.

I think if they say "Kellogg's Corn Flakes"—that is my opinion, now—I think if they say "Kellogg's Corn Flakes" on the menu, they are indicating that they are carrying what is accepted as the standard quality of corn flakes available. I think that applies to anything else, whether it is ketchup or what it is.

If they carry something else, there must be a reason for buying it, and the best opportunity to sell it is to let the public know that they have got it; but I think that, when they say "corn flakes" and have three or four kinds of corn flakes—in fact, I know from experience that it is the most injurious thing to profit that they can do. There must be a reason for buying it, indicated by the reason that there is a demand for it; and, if there is a demand for it, they certainly ought to identify the fact that they have got it to those who want it. And the only place they can put it to do that is on the menu. And there will be no confusion if they will do that. I do not think there is a merchandising expert in the United States who will not agree with that.

I do not think it unethical for a hotel to say merely "corn flakes" on its menu, but I think it is unwise from the standpoint of the hotel. I did not, in any way, in conversation with the waitresses or the cashier at the Biltmore, say that they had no lawful right to carry the Kellogg product, and I did not even say there was no lawful right why they should not substitute it. I made no comments on it. I have not told them a thing about any litigation and no one connected with the hotel knows anything about this correspondence. The letter of August 11th, 1932, to Mr. Lowry was my first letter concerning the Kellogg product and was written after I had seen a reference in the press to a litigation between National Biscuit Company and Kellogg Company. I hoped it would not involve me as a witness in the case.

RE-DIRECT EXAMINATION.

RDQ. 301. If you asked for shredded wheat, Mr. Sweet, what would you expect to get?

A. Exhibit No. 1, or a product of that character.

RE-CROSS-EXAMINATION.

WITNESS: I would take cognizance of the fact that we now know there are two shredded wheat products on the market. I have not been concerned with that at all. I have been concerned with getting shredded wheat of the character of that contained in Exhibit No. 1 when I specified shredded wheat instead of Kellogg's Whole Wheat Biscuit, which was not what I ordered. I shall continue to ask for shredded wheat if I want the Niagara Falls product; and I will ask for Kellogg's Whole Wheat Biscuit if I want that product. I would not ask for Kellogg's shredded wheat biscuit.

If I asked for Kellogg's shredded wheat and they had Kellogg's Whole Wheat Biscuit in stock, I think I would be very likely to get Kellogg's Whole Wheat Biscuit; but if I asked for Kellogg's shredded wheat and they did not have Kellogg's Whole Wheat Biscuit in stock, and did have shredded wheat like Exhibit No. 1, or the same character as Exhibit No. 1, I think that they would be very likely to offer it to me. I would regard it as a particular case of confusion either way. If they gave me something else, I certainly would regard it as a substitution. If I specified the Kellogg product, I would not expect to get anything else because, if I specified the Kellogg product, I would do so because it has made some special appeal to me to make it popular enough to me to ask for it and designate it by name.

RE-CROSS-EXAMINATION.

WITNESS: Now that I have been fully apprised of the facts since April of this year, that there are two products of shredded wheat on the market, I would expect to specify which one I wanted. Because of my interest in cereals, because of my regard for cereal advertising; and because of my regard for the ethics which have pretty generally existed in cereal industry.

any time that I order cereals I will order them by their trade names, and in the future I would specify whether I wanted the Niagara Falls or the Kellogg product. If the restaurant said, "We are only handling Kellogg's shredded wheat product," I would accept that statement.

Such advertising as I have seen would indicate to me that Kellogg has another shredded wheat biscuit in distribution. That is based on what I have seen as a display. I do not think it would be good business for Mr. Kellogg to try to conceal anything under false colors.

RXQ. 298. Yes, and by that display, you do not think that he is trying to do it?

A. I think that he is very definitely indicating that he is making a biscuit—and I know definitely now that he has a whole wheat biscuit and that it is shredded.

In every case where it has come to me in restaurants as a consumer it has come to me in the whole wheat package of Kellogg's.

I certainly would not want to give testimony against the Kellogg Company. My relations with Kellogg have been very cordial. I do not have any reason to want to hurt the Kellogg organization. I have no particular reason for testifying now, except that I have been asked to relate the experience that I referred to. The sole motive that I had in writing Mr. Lowry was that I thought he would want to pass it along to his local branch manager giving the history that I wrote him, and possibly have him go over to the Baltimore and see that I could secure shredded wheat when I asked for it. In other words, here is a customer who wants shredded wheat. See if you can not supply it to him when he asks for it. That is the sole thought that I had in mind.

It is fair to assume that when I wrote Mr. Lowry I had the thought in mind that I could get the product

when I asked for it. That is the sole thought I had in mind.

RE-DIRECT EXAMINATION.

WITNESS: In speaking of the Kellogg slogan on cross-examination, our own slogan when I was employed with the company was: If the customer says corn flakes, they mean Kellogg's; and, if they say Kellogg's—speaking to the retailer—they mean corn flakes; but I was anxious to use that as a basis because it is in exactly the same position today when I say shredded wheat. I mean such as is contained in Exhibit No. 1.

JAMES GALLAHUE.

Deposition taken in Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a grocery and provision dealer, 351 Tremont Street, Boston, having been ten years there, and twenty-five years in an office on Widener Street, Porter Building.

I recognize article from Plaintiff's Exhibit 1 as Shredded Wheat, also recognize the package; first knew of the article at food fair in Boston, thirty-five or forty years ago. George H. Barnes, my employer then, was manager of the fair. They had machinery and made shredded wheat, which is first time I saw it. It looked then like biscuit just taken from Exhibit 1.

I have been familiar with it since. We always carried it. Always had same general shape, size, appearance this biscuit. If they ask for package of Shredded Wheat today, we give them like Plaintiff's Exhibit 1; would not give customer anything else. If he asks for Shredded Wheat, I know immediately what

he desires. When a customer asks for Shredded Wheat, I give him that package with Niagara Falls on it.

I recall having seen on package of Shredded Wheat similar to Exhibit 1, picture of saucer with shredded wheat biscuit in. Cannot say how long; knew it was there, and thought it was on every package. If it was left off, I might not have noticed.

When our customers ask for it, they usually ask for a package of Shredded Wheat. That has been so always since we handled it, thirty-five years or more, and before that when I handled it for Barnes. Until lately, never had any other kind of shredded wheat. Never handled anything but that. I have been asked to handle Kellogg's; thought not enough difference in price to make it an object.

First heard of Kellogg's Shredded Wheat about two years ago. I think the purchasing public, my customers, mean that package, like Plaintiff's Exhibit 1, by shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I never carried Kellogg's Shredded Wheat. I know what the Kellogg package is and have seen it. It has been opened. The Kellogg package and Niagara Falls package pretty much same, except it has "Kellogg" printed on. If I were stocked with Kellogg's Shredded Wheat and a customer asked for it, I would give them Kellogg's Shredded Wheat.

The package shown me by Mr. Vilas is made at Niagara Falls. I have been familiar with the fact it is made there, for many years; had invitations to go there and heard people speak of the wonderful factory there. Never been to Battle Creek. I have seen the Kellogg's shredded wheat biscuit. Think it is little larger package, more in it. I have seen Kellogg's biscuit, a smaller biscuit than Niagara Falls Shredded

Wheat. Package did not look any larger and had 15 cakes in, against 12 in this.

I have seen Niagara Falls individual package, but not Kellogg's; in restaurants. Never handled it. I would not say it is common to illustrate food products with saucer containing some of product. Have seen peas that way; have not noticed it particularly.

Do not remember on early Shredded Wheat package picture of woman holding torch. Do not think Kellogg's biscuit introduced generally into Boston market. First saw it at Boston Wholesale Grocery Company, girl salesman showed it to me. I figured price so little different, most people would want old article. Price of this is about \$1.09 a dozen. Kellogg's, about \$1, two for \$1.98; \$3.87 with discount. This cost \$4.05, and discount about 17 per cent. Price has held steady until reduced lately. Sold it 12 cents for years; now everybody selling at 10 cents. Prices to public and grocers came down, perhaps two years ago.

RE-DIRECT EXAMINATION.

THE WITNESS: Have heard people speak of Niagara Falls factory, perhaps five or six years; two or three different occasions, that they were there and it was a wonderful factory. Other dealers and customers have been there. Customers never ask me for Kellogg's Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I have heard Kellogg located at Battle Creek. We have always carried Kellogg line since they came out. Originally carried Kellogg's Corn Flakes, and the other products all time mills carried them. Kellogg Company has good reputation in the trade. Have not heard it charged with unfair dealing. We have tried other corn flakes but people do not seem

to want them; so we carry Kellogg's almost exclusively. Package of Kellogg's looked like a Kellogg package to me; just looked at it once or twice; did not look at it specially, but saw it was Kellogg package, because of printed signature.

FRED A. SYKES.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer and provisions, at 63 Winthrop Street, Medford, Massachusetts. In retail grocery business since 13 years old; now 50. Owned present store eight years, worked there thirty years. Handled various cereals during that period, and similar grocery products.

I recognize article from Plaintiff's Exhibit 1; have sold it as shredded wheat, nearly from time it started; cannot remember year; but demonstrations of it at various food fairs in Mechanics Building; from then on, we sold it. The expression shredded wheat means the package, Plaintiff's Exhibit 1. I am familiar with it, have handled it for many years.

If customer comes to my store and asks for shredded wheat, as a rule I give him this; at times, on sales, have pushed Kellogg's shredded wheat. There has been a time when a customer has asked for Shredded Wheat and I have given him Kellogg's. At sales, with a lot of other new articles, we try to push the one there is a dollar in. Cannot tell you how often. We had the product in five-case lots, and they ran premiums, dishes, etc. We have made quite a sale of it.

Up to short time ago, trade knew only this Shredded Wheat. When they say shredded wheat, if

they do not find fault with it, we put out the other. Some found fault with it, of course; then we gave them the Shredded Wheat they wanted.

Since I have known Shredded Wheat Biscuit, it has not been in any different shape or form than as put out by the Shredded Wheat Company, that I know of. I do not use it. We sell it in cases or packages. I am not familiar with the biscuit as people who use it every day. I like other cereals, like old-fashioned oat meal.

I think at one time different label on Shredded Wheat than now, with saucer or something; do not know how long ago; but I know there was different label from now. Cannot say I ever had posters or cards in my store displaying Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Shredded Wheat salesman asked me to come here today, said they were having discussion here regarding Shredded Wheat; all the conversation I had.

I carry Kellogg's Shredded Wheat. First time I saw the package, recognized it as Kellogg's package; did not confuse it in any way with Niagara Falls package. The packages are different. I have carried Kellogg's line from time they started with Force people, and then their corn flakes right after. Always found the Kellogg people to deal fairly with me. They have good reputation in trade.

When I first had Kellogg's shredded wheat, a customer sold it to me. I featured it then at a considerable cut below this shredded wheat; made quite a display of Kellogg's biscuit. People who came into the store could see what the packages were. We sometimes put package of Kellogg's in basket on route.

When customers ordered Shredded Wheat over telephone as in past, we gave it to them. Sometimes or

sales, we put in Kellogg's. Some wanted it changed; but lot of them kept it. We sell today a lot of both kinds.

Believe I was told the Kellogg packages are a little smaller. I do not use Shredded Wheat personally; have not opened any packages. In my store, a few recognize there are two shredded wheats made by different manufacturers. I continue to carry Kellogg's biscuit. At the time I first had it, they were giving green dishes with each package, a plate or saucer, or cup; which is often practice today in introducing a new article. We have several articles they give a dish or cup with. We gave it with every package of Kellogg's biscuit, just as we advertised it, placards in the window display, prominently.

I have not noticed advertisements of Kellogg's Shredded Wheat, except window displays.

RE-DIRECT EXAMINATION.

THE WITNESS: I now stock both products; cannot swear what Kellogg's product is now called on package. All I know it by is just shredded wheat. That is what it is called when we had the demonstration. Sixty per cent. of our business is telephone. Since we ran those sales, quite a few wanted the other, and when a customer asks for Shredded Wheat, we usually give him a package like Plaintiff's Exhibit 1. Very few customers today ask for Kellogg's Shredded Wheat. We have it for those who want it.

RE-CROSS-EXAMINATION.

THE WITNESS: I always took this for Niagara Shredded Wheat. The other is Kellogg's Shredded Wheat. I take it they are both the same thing. Shredded wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I have seen no packages by Kellogg with a cellophane window showing what is inside.

JESSE A. LEONARD.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am fifty-nine, a grocer, retail, in Auburndale, Mass.; having been in grocery business twenty-six years, always in same place, my own store and business. I carry usual line of retail groceries, including cereals.

I recognize article taken from Plaintiff's Exhibit 1; it is a shredded wheat biscuit, which I have known ever since I have been in business, and four years previous, while working for other grocers, total of thirty years. Shredded wheat biscuit is a biscuit that comes out in shreds and is baked into that form. I have been through a factory and seen the process, at Niagara Falls. The only theory of that name I have is that it was given to it by its originators.

When our customers ask for shredded wheat, we give them just shredded wheat. I do not know any other. That is the only one I have ever seen or handled. I can only send a customer what we have in shredded wheat. Plaintiff's Exhibit 1, a package like that is the only one I have ever seen. Shredded Wheat has had a very large sale with me. I do not recall having seen advertisements in the form of the representation of a saucer with biscuit in it.

CROSS-EXAMINATION.

THE WITNESS: I have heard of but never have seen a package known as Kellogg's Whole Wheat Biscuit or Kellogg's Shredded Wheat. I think a grocer in town said they had it in.

ROBERT H. HAMILTON.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have been in the retail grocery business forty years, since I was eighteen, my entire business life; at my present address, 4202 Washington Street, Dedham, Mass., five years, last June, prior to that on High Street, in Dedham. My store is Robert Hamilton & Sons. We carry the usual line of retail groceries, including cereals.

I recognize the item taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known since January 6, 1895. When this discussion came up, I was interested to know how long shredded wheat was on the market and I had known it. A few days ago I looked through an old chest in the cellar, picked up old account book and saw we bought first shredded wheat biscuit January 6, 1895. I was asked about it by a representative of the National Biscuit Company and was curious to know something about it.

We have carried Shredded Wheat ever since that time. I do not recall any change in general form, appearance, or shape of the biscuit. I recognize the package, Plaintiff's Exhibit 1; do not recall any material change in it. They may have changed some of the printing. I notice a picture of Niagara Falls on the package, which has been there as far back as I recall particularly.

When a customer says shredded wheat, it means a package like Plaintiff's Exhibit 1. When a customer orders it, that is the package I supply her. Many of my customers order by telephone. They order this product as Shredded Wheat. When we get such an order, we supply this shredded wheat; have never supplied any other.

I think, some years ago, they used to have advertising of shredded wheat with a sort of saucer and two shredded wheat in it. I recognize Plaintiff's Exhibit 1C for identification as one of the old style packages. I would say we have handled shredded wheat in a package like that quite a while ago. I see at the bottom of the panel in which a building is shown, a copyright designation, but that does not refresh my recollection when we handled it. I recognize the representation of the saucer with shredded wheat, to which I previously referred. I do not know how long ago they used that package, but it is quite familiar to me.

I have a general idea in my mind of what Shredded Wheat is. When a customer asks for it, I always have taken for granted that she means a package of shredded wheat, packed as Plaintiff's Exhibit 1. As I understood, that is what this package is known as by everybody I have come in contact with, as shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I regard the term shredded wheat as describing the form and nature of the biscuit in the package, too; because I think the name applies as the biscuit, not as a shredded wheat in any other form. When I say shredded wheat, I mean a biscuit made of wheat, shredded, in this biscuit form. I mean this biscuit form. That is what they want, what they mean.

I do not, at the present time, know of any other shredded wheat biscuit on the market besides this Niagara Falls Shredded Wheat. Some time ago, there was another shredded wheat on the market, the Kellogg product, and I saw a package of it. At that time, it was called shredded wheat. I saw the biscuit, itself. I knew it was a biscuit similar to this one. It might have been a trifle different in size; I am not positive. I just saw it one time, when the salesman brought it

to me and tried to sell me some. I did not stock any of it. We carry other Kellogg products, sell a great many of them.

The salesman said, in effect, they were out with a new shredded wheat biscuit and wanted us to put it in, used the usual sales talk.

We average four to five dozen packages shredded wheat a week, which is more in packages than any other cereal, except Kellogg's Corn Flakes. I have never at any time stocked Kellogg's Whole Wheat Biscuit. The salesman only offered it to me once.

RE-DIRECT EXAMINATION.

THE WITNESS: My principal reason for not stocking the Kellogg biscuit was they were coming out and stealing the product of another firm. I told the salesman so and gave him a good, sound talking to about it. I said, "To my mind, you are simply going out and trying to steal their business and putting out a shredded wheat, which they have had on the market for years and years. I do not approve of it, do not sanction it, and will not buy it at all." I remember that particularly.

RE-CROSS-EXAMINATION.

THE WITNESS: I have always felt that nobody except the Niagara Falls company should make a shredded wheat. If I were in their place, I should think any other concern coming out with that would be an infringement on the product. I had that feeling when Kellogg first put out corn flakes and then other people did, to some extent. I feel the first one putting out corn flakes, or wheat or rice flakes, should have a preference, at least. I cannot say I feel no one else should make that same product; but I do not think he should come out and sell it as the same thing. He can make the same product.

As I recall, the name on the Kellogg package shown to me by the salesman was shredded wheat, and, of course, the usual advertising and the Kellogg's name. I have heard of Kellogg's Shredded Wheat since then. I do not think they have any right to put out a package marked shredded wheat.

I saw one of the Kellogg biscuit packages just once. I did not think it was an original package of shredded wheat, because I was familiar with the size of this package. I knew it was not. I am not a believer in someone else stealing any other man's product. I think that the shredded wheat product, as shredded wheat, under that name, and the right to make that product belongs perpetually to the Niagara Falls concern. If I discovered it was a patented product, on which the patent had expired many years ago, I would still feel the same way.

After the patent runs out on Gillette Safety Razor, for instance, I think others could make a safety razor; but I do not think they should call it the Gillette safety razor. I do not know it would be considered a Gillette type, but it would be a safety razor.

I carry two brands of corn flakes: Kellogg's and Post's. If a customer simply asks for corn flakes, we give them Kellogg's. I have no doubt Post's Corn Flakes are corn flakes. I have every reason to believe they are. I simply regard them as corn flakes not made by Kellogg.

I have never been to Niagara Falls. I knew they were somewhere before they went to Niagara Falls, but did not recall where. I was never interested in the Shredded Wheat Company in any way, except to make what money I could by selling the product. I use the product myself one or two mornings a week.

I do not believe there should be any competition in the manufacture of the product known as shredded wheat, under the name of shredded wheat. I would not think it would be wrong for me to stock Kellogg's

Whole Wheat Biscuit in a carton such as you show me, if I wanted to (Defendant's 4 for identification). I would not feel that I would be doing any wrong.

I did not stock Kellogg's because I did not think it was right for them to come on to the market with a package calling it shredded wheat. I would not say Defendant's Exhibit 4 is a wrong package for Kellogg to put out, if they are going to put out a package of whole wheat biscuit and call it shredded wheat. I, personally, would distinguish that from the Niagara Falls package, like Plaintiff's Exhibit 1, very readily. I would regard that, in color and makeup on the line of the Kellogg package. (Second carton marked Defendant's Exhibit 5 for identification.)

RE-DIRECT EXAMINATION.

THE WITNESS: Customers do not usually examine carefully the ordinary packages they receive. In some lines, like fancy goods, they examine them very carefully. I think the ordinary housewife, if we sent her Defendant's Exhibit 5 for identification, would recognize the difference between that and the Niagara Falls package.

I do not think the average person would be very much confused by the representation of a dish with shredded wheat in, as appearing on Plaintiff's Exhibit 10 and Defendant's Exhibit 4. I think some housekeepers, some housewives, would notice the difference.

Looking upon it from the point of view that it was a copy of someone else's package, I would not consider it right of the Kellogg Company to place upon either Defendant's Exhibit 4 or 5 for identification, a picture of a dish with biscuit in it.

When I talked to the Kellogg salesman, I referred to the use of the whole thing, as a whole, the package of Shredded Wheat itself, coming out, putting out on

the market of the shredded wheat itself; trying to get me to put that in and sell it or put it out in preference to a product we had been selling for years. I think the salesman had his package open. The biscuit I then saw was very similar to the biscuit in Plaintiff's Exhibit 1.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think I testified it was a smaller biscuit; it might have been a trifle smaller. I was not sure. The name on the package was Shredded Wheat. There was nothing more that I recall specifically, except on those packages the usual advertisement of the Kellogg Company. That was several years ago. The first I knew of any litigation or any prospect of it was about a week ago, when I was asked if I would come into the hearing. I was told there was a suit on between the two companies. They did not say what it involved. I looked for some information in regard to it.

It is a common practice, done quite often, to illustrate on the container of a food product the representation of a dish containing a quantity of the contents, an ordinary advertising device.

MRS. GRATIA C. SANBORN.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a demonstrator, now employed by Swift & Company, promoting sales of different products. I have been employed by the National Biscuit Company to promote sales of Wheatworth cereal and flour, and other cereals, for just five

weeks, beginning about the thirteenth of October, 1932. I never had any other connection with them.

I recognize the article taken from Plaintiff's Exhibit 1, shredded wheat, which I have used in my own home for twenty years, always, as a breakfast cereal. The only way I would ever apply the term shredded wheat is to one of those biscuits. The only thing I know about shredded wheat is there. We always connected shredded wheat with Niagara Falls, a great many years before I knew who manufactured it. I always purchased it in packages.

The packages, as I have known them, during the time I have used it, have been similar in appearance to Plaintiff's Exhibit 1. I have bought shredded wheat in packages like Plaintiff's Exhibit 10, with a dish on the end, which I recognize. I have known that in connection with shredded wheat a number of years. If I saw a dish like that, I would naturally think of shredded wheat, the cereal breakfast biscuit, shredded wheat.

I went into a store, asked for a package of shredded wheat, and was given a package. As it was taken from the shelf, I saw it was not shredded wheat, as I know the product, not the same shaped box. This was October, 1932, in Hamilton Cash Market, Hamilton, Mass. I said to the lady serving me: "Is that shredded wheat?" She said, "Yes; shall I do it up for you?" I first said no and then yes, and it was given me. Plaintiff's Exhibit 11 is the package she sold me; my signature and the conversation that took place are on a piece of paper pasted to it, which identifies the package to me as the package I received then. I had no farther conversation with the sales person at that time.

Another time, I ordered a package of shredded wheat over the telephone, from a local dealer near my home, where I am living now. A package was delivered to me similar to Plaintiff's Exhibit 11. I used it. No

package like Plaintiff's Exhibit 1 was delivered in the order.

CROSS-EXAMINATION.

THE WITNESS: I went with the salesman of the National Biscuit Company, Kenney, to make the purchase. He asked me to buy a package of shredded wheat. I was working for him at the time. It was while I was working for the company then, and he repaid me.

I have only used Kellogg's Whole Wheat Biscuit once, the time it was brought into my home. I do not eat cereals at all. I noticed it was the same type of biscuit, but not shredded wheat as I have always noticed the shredded wheat biscuit. The size was different, no particular difference in taste. I did not notice the biscuit toasted on bottom as well as top. I do not eat shredded wheat biscuit myself. I noticed the difference in the package as soon as the girl reached for it.

I have seen food packages from time to time with an illustration of a plate with some of the food in it. That is the only type of package or food of that particular type that I have seen this illustration of a plate with two biscuit on. I have seen manufacturers doing that same thing on beans.

MISS ELIZABETH C. BARRETT.

Deposition taken at Boston, Massachusetts, November 20, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a stenographer for Colin Cole, not employed by or connected with the National Biscuit Company.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat. I have been familiar with

it all my life, pretty nearly, thirty years, more or less. I have been a user of shredded wheat during that period. I purchase it at retail stores and at restaurants. It is served in restaurants, both in and out of the package. I have had it both ways.

Shredded wheat or shredded wheat biscuit conveys to my mind a sort of stringy substance, and I know it is more or less porous. It is shredded wheat. Shredded wheat is the original shredded wheat; Shredded Wheat Biscuit from Niagara Falls, not from any other place, always from Niagara Falls.

At the Hawthorne Hotel in Salem, Massachusetts, about three weeks ago, I asked for shredded wheat, and they brought me some biscuit that looked similar to a shredded wheat biscuit, not as large, came in a package marked Kellogg's Wheat Biscuit or something like that. I called the waitress and asked if it was shredded wheat. She said yes. There was a package with two biscuit, and I said, "This is not shredded wheat." She said, "Yes, it is." I said, "Does it say so on the package?" She said, "No. Well, it is, just the same." She did not take the package back. I finally accepted it. I kept the box they were in. I recognize Plaintiff's Exhibit 12 as the carton delivered to me then.

I also brought with me a menu card, which is Plaintiff's Exhibit 13. I do not know who put the pencil mark around the words shredded wheat. I did not do it.

I have noticed and been familiar for a long time with the picture of a dish with biscuit in, such as is on the end panel of Plaintiff's Exhibit 10, in connection with shredded wheat advertising. I have purchased packages of shredded wheat with that picture on them. For fifteen years, this has meant shredded wheat. If I saw that picture of a dish on another package, it would mean shredded wheat to me.

I have seen packages like Defendant's Exhibit 4. The panel of that package with a dish with two biscuit in it means to me shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I came to testify today through Mr. Sullivan, brother of a friend of mine. I imagine he is connected with the National Biscuit Company. He was talking about his company and more or less joking. He said, "If you go to lunch, order some shredded wheat." This was at the Hawthorne Hotel. That was the only time I had any conversation with him about the case. I made a written statement of the incident then and signed it.

I have seen packages like Defendant's Exhibit 4 in stores, up on the shelves. I have used other Kellogg products.

I have eaten Kellogg's Whole Wheat Biscuit on other occasions besides this incident at the Hawthorne Hotel.

I think I have seen within a couple of years a package of Niagara Shredded Wheat with the illustration of the dish. I have seen other food products in packages with illustration of a dish containing some of the product in the container. I do not think it is necessarily a method used in a great many food packages. I would not be surprised if you told me you could show me dozens of packages in a grocery store, each illustrating a dish with some food in. I have only noticed it on this package. This means shredded wheat to me.

I have noticed a dish on the outside of the Kellogg package, too. Those two instances are the only ones I recall.

MISS MARIE CREEDON.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I work for the John F. Cabeen Company, plumbing and heating; not connected with National Biscuit Company in any way whatever.

I recognize the item taken from Plaintiff's Exhibit 1. It looks very much like shredded wheat, but a little smaller than the biscuits I have seen. I have known shredded wheat all my life, all of twenty years or more. I have used shredded wheat more or less during all my life and have bought it at stores. I have ordered it by telephone. I have been familiar with it in a package like Plaintiff's Exhibit 1, and I have seen it in a package like Plaintiff's Exhibit 10. I have often noticed a picture such as is on the end of Plaintiff's Exhibit 10 in ads in magazines.

Shredded wheat to me means a wheat biscuit made in Niagara Falls, a product of the Shredded Wheat Company (reading from the package in front of witness). It does not mean the product of any other concern or company. I never connected it with anybody but the Shredded Wheat Company.

Recently, I went to a store in Salem, Massachusetts, asked for shredded wheat, and was given Kellogg's Whole Wheat Biscuit. It was a National or Hurder's, or one of those grocery stores, on North Street. The fellow took down this Kellogg's package. I said, "That is not shredded wheat." He said, "Oh, yes, it is; it is just the same thing; only you are getting fifteen in a package instead of twelve. You are getting more in a package." I said, "Is that exactly the same thing?" and he said, "Yes." I took the package, which

is Plaintiff's Exhibit 14. The piece of paper pasted thereon is my statement, signed by me.

CROSS-EXAMINATION.

THE WITNESS: I had never made any other purchases at this store of G. B. Hurder. Mr. Sullivan of the National Biscuit Company asked me to go there to buy shredded wheat. I have known him maybe a couple of years. He refunded what I had paid. He just asked me to ask for shredded wheat and observe what was said. I said, "It is not shredded wheat." He did not tell me to say that. He told me to ask for it and see what they gave me. He did not ask me to go to any other store, just picked out that one for me. There are quite a number of National stores in Salem besides that. I usually do my buying over on my street, that I prefer. He did not say anything about going to my own grocer.

CHAUNCEY A. STIMETS.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, at 1286 Washington Street, West Newton, Massachusetts, in business for myself for seventeen years; worked in it, thirty-four years, in West Newton.

I recognize the article taken from Plaintiff's Exhibit 1 as Shredded Wheat from Niagara Falls. I have sold it, I guess, thirty-three or thirty-four years. I cannot say it has changed during that period in general appearance, size, or shape of the biscuit. I should say it has been substantially the same. The package is practically the same. The lettering has been prac-

tically the same. I could not say just what has been changed in that. I recognize and should say I have handled the product in packages like Plaintiff's Exhibit 10. I do not recall if the dish with biscuit in on the end panel of that package has been on all the time or not. I do not recall seeing that dish with the biscuit in it, in connection with shredded wheat.

Q Shredded wheat, to me, means this: They use it in the business. They fill orders from that Niagara Falls Shredded Wheat. Anybody that asks for shredded wheat, that has always been our way; filling orders with Shredded Wheat of Niagara Falls. If a customer asks me for shredded wheat, I fill it with this Niagara Falls Shredded Wheat. When a customer orders shredded wheat, she expects to receive Niagara Falls Shredded Wheat. That has been true ever since I handled it.

CROSS-EXAMINATION.

A THE WITNESS: I am not familiar with any other shredded wheat on the market besides Niagara Falls Shredded Wheat. I have heard of Kellogg's Whole Wheat Biscuit; have it in the store now. I would never fill an order for shredded wheat with that. I would supply it in answer to calls for whole wheat biscuit. I have had people call for Kellogg's Whole Wheat Biscuit and gave them that product. I think I tried some when it first came on the market, last three or four years, something like that. It is an advertised product.

RE-DIRECT EXAMINATION.

A THE WITNESS: Once in a while we have a call for Kellogg's Whole Wheat Biscuit. The sale is very small.

MRS. FLORIDA P. McCABE.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: My husband is an agent of the National Biscuit Company.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, with which I have been familiar since I was a little girl. I have been a user of it. I eat it every other day, and have been a purchaser of it for eleven years.

Shredded means to me something taken apart, shredded to pieces. The minute I see shredded wheat, I always think of shredded wheat coming from Niagara Falls. I positively never think of shredded wheat coming from any other place; I never have any such idea.

The biscuit I have known as shredded wheat has always been the same to me, throughout the years. I have been familiar with the package in which I purchased it. It has changed a little bit. It used to have a saucer with biscuit in, like the picture of a dish with two biscuit in on the end panel of Plaintiff's Exhibit 10. I have known that for a long, long time. It is associated in my mind with shredded wheat. I have never seen it used to advertise any other product until the day when I was given a different package. I needed shredded wheat and I went into the store of Fontaine, at Castle Hill, Salem, Massachusetts, about a month ago. I asked the clerk for a package of cigarettes, and he gave them to me. Then I asked for a package of shredded wheat. He handed me this package, Plaintiff's Exhibit 15, which did not look like shredded wheat to me that I have been using. I asked him if it was shredded wheat, and he said yes. I said, "It does not look like the shredded wheat I have been using." He

said, "It is positively the same thing, except it is a smaller biscuit." I said, "I want to make sure that, when I call for anything, I find what I want." He said, "That will be the same."

I took the package. The piece of paper attached to it is my report, signed by me. That is my signature on that exhibit. Having refreshed my recollection by looking at the exhibit, the store was 327 Jefferson Avenue, and the date, November 2, 1932.

CROSS-EXAMINATION.

THE WITNESS: My husband positively did not ask me to make this purchase. I wanted shredded wheat. After I told Mr. McCabe I wanted shredded wheat, he said, "Why do you not go to buy it in that store?" So I went. I have no regular store to trade in; go everywhere. I live at 49 Hawthorne Street, Salem, about five minutes from 327 Jefferson Avenue. I had not made purchases in that store before; that is the only one I made there.

My husband did not tell me to get it there. He asked me if I wanted to go. It was convenient for me because I was going up that way. I have bought shredded wheat since that time in another store. That time I went to the store across the street. They did not have it and sent me to this store, which my husband had suggested. I needed shredded wheat. The typed notice was put on the package at the National Biscuit Company, Jefferson Avenue. When I got the package, I turned it over to my husband, who took it away. Some time later he brought it back to me to sign, and I signed it, the same day. Mr. Kenney brought it back to me the same afternoon to sign. I had turned it over to Mr. Kenney, not my husband. He is connected with the National Biscuit Company, I believe. I was with Mr. Kenney that morning. He

stayed outside while I made the purchase. He was not outside the first store I went to. I had been the day before to that store and knew they were out of it. Nobody suggested to me the day before to go to the store which was out of it. That store was on the way to the beach. I would stop if I needed little things in the summer once in a while.

The package I needed the day before, I needed shredded wheat. If they wanted to buy it for evidence—that was a package I was buying for them, if they had had shredded wheat. Mr. Kenney did not tell me to go to that store, also. Mr. Kenney came to me the next day and suggested I buy it at the Fontaine store, and he joined me and took me to the Fontaine store and stayed outside. I did not go to any other stores that day with Mr. Kenney.

HAROLD M. ROBBINS.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am buyer and store manager of the Star Market Company, just one store, at Watertown, Massachusetts, meats, groceries and provisions. I have been in the retail grocery business fourteen or fifteen years, with Star Market six years. We deal in a full line of groceries, including cereals.

I recognize the article taken from Plaintiff's Exhibit 1 as a shredded wheat biscuit. I have known it since I have been in the grocery business and before, as a consumer. The Star Market carries it. During the time I have known it, I could not say whether it has changed in appearance, shape, size, color, etc.

If you came in my store and asked for a package of shredded wheat, and I was on the counter, I would

pass you shredded wheat biscuit, the same as in Plaintiff's Exhibit 1, with the Niagara Falls picture on the end. Shredded wheat means to me a product that comes from Niagara Falls, on account of the picture of the Falls on the end of the package. It is the only product I would call shredded wheat. If a customer would come in and ask for shredded wheat, that is what they would get.

To my customers and the purchasing public generally, shredded wheat means the same as it does to me: that the package of the Niagara Falls company is Shredded Wheat.

I have seen in the ads of the Shredded Wheat Company or the National Biscuit Company, an illustration representing a dish containing the biscuit. As I remember, that was on the end panel, as in Plaintiff's Exhibit 10. I do not remember just when or how long. I have noticed it mostly in the ads, not so much on the package. I refer to magazine ads.

Kellogg salesmen have been in to me to buy their biscuit, but I did not stock it. I stock everything in Kellogg's, but not the biscuit, because shredded wheat has the demand and the call; and it would mean we would have to push and explain to people that Kellogg's biscuit was something similar. Perhaps the customers would take it; perhaps not.

SAMUEL ABRAMSON.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer in business for myself, at 331 Eastern Avenue, Malden, Massachusetts. I have been in the business thirty-one years, for my-

self, in Charlestown a short while, and twenty-eight years in Malden. I carry a full line, including cereals.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known more than twenty years. The label has changed, maybe once, to my knowledge. The biscuit has remained the same thing. I carry this line of shredded wheat biscuit and have carried it about twenty years. The public has always asked for shredded wheat. When a customer asks for it, I give him shredded wheat, positively. If they ask for shredded wheat, we give them shredded wheat. A customer never asks for anything but shredded wheat. We forget the company or where it is coming from or what it is, when they ask for shredded wheat.

I happened to be at Niagara Falls once. That is the reason I know where it comes from. The chances are I might not think of it, or maybe I would. I saw the factory.

I saw a representation of a dish with two biscuit in it, a few years ago, in connection with shredded wheat. That was like the dish on Plaintiff's Exhibit 16, which I recognize. It must have been five, or eight, or ten years ago. A representation of the dish with biscuit does not mean anything to me, because we are in the habit of calling it shredded wheat.

We tried the biscuit of shredded wheat put out by the Kellogg Company, and it did not go very fast. We had that shredded wheat, but it did not go very fast, and we cut it out. That was a couple of years ago or so. The customers used to call it shredded wheat biscuit and shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: In the last six months, we have been connected with a voluntary chain of 155 members.

I have no idea if any member carries Kellogg's biscuit. Nobody was interested in it. We carry it once in a while; but it is a kind of merchandise that does not run fast, and we try to cut it out.

One of the salesmen asked me if I would come here. I told him I had no objection. He did not tell me why; just asked me if I was going to Boston Tuesday. I told them I was going to see the doctor. I do not know if any other members of our chain are here today. I have not got my list.

If a customer asks us for Kellogg's Whole Wheat Biscuit, we are just around the corner from Northern Products, and we go there and get it, maybe a dozen at a time. We always get a lot of shredded wheat, because there is a big demand for it.

It is very common to put an illustration of a dish with the food on packages of canned food, such as baked beans, or peas. I remember Peter Pan peas used to have it with a dish, but that has been taken off. I have not noticed that practically every food product in packages has some such representation.

RICHARD CLARKE.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer, retail, under name of L. E. Smith Company, in Lexington, Massachusetts, forty-five years altogether, thirty-two in Lexington; at present time in partnership with two others. We carry a full line of meats, groceries and fish; and we have cereals.

I recognize the article taken from Plaintiff's Exhibit 1, as shredded wheat, which I have known since I

was in Lawrence; I should say about thirty-five years ago. I should say the appearance, shape, size, color, etc., of the biscuit have remained practically the same throughout those years. It looks a little browner on top. It has not been altered in any other respect that I have ever seen. The package has been changed, just simply on one end, I should say. One end used to have, I think, a dish with a biscuit in or alongside of it. The other end had Niagara Falls. Plaintiff's Exhibit 1 has Niagara Falls on both ends.

I know there was a change in the package while I have been in Lexington. Plaintiff's Exhibit 10 is the one I have in mind. That was used by the Shredded Wheat Company I think up to a very few years ago.

If anybody should order shredded wheat, we would give them the one with the Niagara Falls on, which is the only one we ever had until the last few years.

The term shredded wheat has a connection in my mind with the origin or source of the product. I took it that it meant that they were the originators of the shredded wheat, when this first package came out. We never ordered anything but shredded wheat, never signified anything but the one kind; and we always got the one kind.

From my experience over the years as a retail grocer, the consuming public has in mind that this is the package they would want, the Niagara Falls package. I recall that, because that is the only way I know of it.

A short while ago, we were out of shredded wheat and had Kellogg's biscuit. A lady came in and asked for shredded wheat. The clerk came to me and said, "What will we give her?" I said, "Give her that. Is that not shredded wheat?" He gave it to her and she refused it. That is the only such incident in my experience, about a year ago. She wanted the kind she had always had, she said.

I do not think the representation of a dish with two biscuit on it on a package of cereal conveys to my mind any indication of its source or origin. We carry Kellogg's Wheat Biscuit, and we carry Muffets, which is something on the same principle, but a round package, made practically like a shred, something like shredded wheat. I think it resembles in appearance, but not in shape, shredded wheat. A Muffet can readily be distinguished from a shredded wheat biscuit. Customers usually ask for these products by name.

When they ask for the Niagara Falls product, shredded wheat is all they ask for. I have never had anybody ask for anything else, except that one instance, where she asked for shredded wheat and we gave her the other. Our customers sometimes ask for Kellogg's Whole Wheat. I do not think I ever had any ask for Kellogg's Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Mr. Murphy, the man from the National Biscuit Company, asked me if I would come in and testify how long I had been in business and what I know about shredded wheat. I told him what I have told you. Seven years I was painting, but most of the time, I have been in the grocery business. Our firm belongs to the Pioneer organization. I have not seen any members of it here today.

BENJAMIN FEINBERG.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the department food market business, the North Shore Market. We carry every

kind of food, including groceries, fish, meats, cereals. I have been in that business about 18 years, during which I have conducted this food store. Previously, I was in the wholesale grocery, salesman for five years.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, with which I have been familiar ever since I have been in the grocery business. The biscuit looks the same to me as it has always. I recognize the package. I remember the picture, as far back as I can remember. I cannot say I have looked it over thoroughly to notice any changes. I remember the picture of Niagara Falls on the end and the buildings on the side panel.

I recall seeing a carton like Plaintiff's Exhibit 10. I never studied the back of an outside container, but I remember the container, the biscuits, and buildings. I do not remember the time, the two biscuits and plate were used. I would say the package looks just like this now, because it is one of thousands of things we sell. Naturally, I do not get down to examine the package, as long as the contents are the same. When a customer asks for shredded wheat biscuit, we give him shredded wheat. It is the only thing I have, except sometime ago, when Muffets came in.

We were a little indisposed against shredded wheat then, because Muffets were good priced when first introduced; and we tried to substitute that way. At one time, the chain store cut the price and there was no profit for us in shredded wheat. But nobody would accept Muffets, because they asked for shredded wheat. The only reason we brought up the Muffet question was that the salesman sold me the idea of substituting Muffets for shredded wheat, and we were not successful in doing that.

We just know the shredded wheat as the biscuits there; that is all we know of. I do not know of any article of that sort, any different thing but shredded

wheat. I have dealt with the public direct in selling them cereals. The only thing I know as shredded wheat is this shredded wheat that comes in that package, Plaintiff's Exhibit 1, just that sort and nothing else. The buying public mean by shredded wheat just that package and absolutely nothing more, as far as my experience is concerned. That has been true ever since I have been in business.

The expression good-will means to me the fact that, if something becomes established, it ought to have a certain amount of protection, after you have worked hard to build it up. As a merchant, I would say I think there is good-will, as I understand it, attaching to shredded wheat, on account of the advertising of it and the good-will that it has built up of itself, so that, whereas, when we tried to substitute, it did not work out. I know from observation that the Shredded Wheat Company has advertised its product.

CROSS-EXAMINATION.

THE WITNESS: I was asked if I would care to come down to the Parker House, visit representatives of the shredded wheat people, and answer some questions about shredded wheat. The salesman talked to my head bookkeeper, who got me when I was very busy. I had to go to the hospital every morning anyway, and dropped in here on my way back. My bookkeeper told me it was practically the same thing I just repeated, about shredded wheat, and if I knew anything about the Kellogg's Wheat Biscuit. To be frank with you, I did not know there was any such thing. It was never offered to me personally. I am a busy man, except the last few quieter months, and I could not give my attention to all departments. I was doing the buying. Outside of that, I do not seem to have been approached about it.

I belong to the Thrift, a voluntary chain, in order to get special discounts. I do not know if any members handle any Kellogg's biscuit. If I had known, I would have known about Kellogg's Whole Wheat Biscuit. I heard of Triscuit, but never of Whole Wheat Biscuit. This is the first I heard of it, because of what the salesman asked my bookkeeper.

I had some trouble with shredded wheat, because I found I could not get it cheap enough to get a competitive price. We put in Muffets, thinking it was a good way to resist chain store competition. They were a Quaker product. It looked like a shredded wheat. We thought it would take its place. I do not know how long Muffets have been on the market. We sell very few. We carry it and have a few calls. It is circular. I would not call it cup shape.

I have never seen any package like Plaintiff's Exhibit 14, never handled it in my store or had anything to do with it and do not know what kind of product is inside the package; do not know anything about it.

ARTHUR R. ELLIS

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, at 62 Bacon Street, Waltham, Massachusetts, in my twentieth year in business in Waltham.

I recognize the item taken from Plaintiff's Exhibit 1 as shredded wheat, and have known it at least twenty-five years. I remember seeing it first in England when I was an errand boy, twenty-five years ago. I am just over twenty-one years here. During that time, I have carried shredded wheat among cereals. As far as I can

see, the form, appearance, shape, and size of the shredded wheat biscuit is practically the same as when it first came out, or when I first remember it. I cannot see anything different in the package from what I have always known. Plaintiff's Exhibit 1 certainly looks familiar to me. I have sold quite a lot of it, the second largest cereal seller we have in the shop. I recognize the picture of Niagara Falls on the end panels, which has been on the package since I have known it.

I can remember a package with a picture on the end with a dish with two biscuit. I do not have to look at Plaintiff's Exhibit 10 to recognize the dish. That is what I have reference to. I cannot recall any time that was not there. I see it is not on Plaintiff's Exhibit 1, so I am wrong there. Plaintiff's Exhibit 10 is the old package we had. I should say it was up to within three or four years ago, prior to that for at least ten years.

For shredded wheat, I never knew anything else but just shredded wheat. To me it has always signified the picture of the factory at Niagara Falls, and this biscuit inside, such as I see in Plaintiff's Exhibit 1. Shredded wheat has never meant any other product to me. If a customer comes in my place and asks for shredded wheat, that is the only thing I know to sell them, Plaintiff's Exhibit 1, the Niagara Falls product.

I have never sold Kellogg's Shredded Wheat Biscuit; but I have sold the Triscuit, which is, I suppose, made of somewhat similar ingredients, but it is not the same type of biscuit. I guess the National Biscuit Company makes Triscuit at this time; made by the Shredded Wheat Company, I guess, before National took it over. I have carried Kellogg's Corn Flakes, and Kellogg's Bran, and things like that; but I do not carry their shredded wheat biscuit or whole wheat biscuit.

CROSS-EXAMINATION.

THE WITNESS: Mr. Murphy of the National Biscuit Company asked me to come down today. He told me Kellogg was putting out shredded wheat biscuit, and the National people were up in arms about it; that they did not like it, and they were going to fight it. He asked if I would come down to testify. I had sold shredded wheat; did not ask me whether I had carried any of Kellogg's Shredded Wheat.

I am an independent, just for myself, do not belong to any buyers' chain. I have never had any experience with Kellogg's Biscuit, like Plaintiff's Exhibit 14; but I have seen a package like that before. A man came in the store and tried to sell it to me. I did not buy it. I usually buy through wholesalers; generally through Washington Street office there. We get our shredded wheat now direct from National. Kellogg sells its products to wholesalers.

Kellogg's Corn Flakes is the largest cereal seller we have. I have known of Kellogg for many years and always found them always fair in their dealings. I have handled other Kellogg products besides Corn Flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I did not stock Kellogg's biscuit because I guess I am kind of funny. I do not believe, after a man has established a business, anybody should come up behind him and take his business away; nor that, after Shredded Wheat has been on the market so long and got such a fine reputation, somebody else should come and take it away.

When I said I found Kellogg's fair in their dealings, I meant they have always treated me all right in my dealings with them. In that particular thing, I do not think they are doing the right thing.

RE-CROSS-EXAMINATION.

THE WITNESS: I think this package is an unfair package as compared with theirs. I think absolutely it would be confused with their package. I think surely this package, Plaintiff's Exhibit 14, is comparable to Plaintiff's Exhibit 1. Taking Plaintiff's Exhibit 10 and Plaintiff's Exhibit 14, I do not think that is right. I do not believe in the whole thing, the product itself. The Shredded Wheat people have built up a business. Kellogg has a darned good business, Kellogg's Corn Flakes. Why should they come and meddle with this one?

I handle Kellogg's Corn Flakes and Post Toasties. I did not sell one of Post's to a case of Kellogg's Corn Flakes. We have not the demand. I did not give it a thought when Kellogg's brought out Corn Flakes and then Post Toasties came out. I do not like the Post Company introducing competition in the corn flakes. I do not think that is just. I feel Kellogg should have had a complete monopoly in their brand of corn flakes, because they brought it out. I do not know as to the National Biscuit Company. I will go back farther than that and say that the Shredded Wheat Company should have a monopoly, for all time, absolutely.

RE-DIRECT EXAMINATION.

THE WITNESS: Eliminating for the moment the words "Kellogg" and "biscuit," the picture of two biscuits on a dish represents shredded wheat to my mind. It is one of these, and it is in a dish. Taking a biscuit from Plaintiff's Exhibit 1, taking the two together, it is just a small picture of the shredded wheat. I think it is unfair.

RE-CROSS-EXAMINATION.

THE WITNESS: If the Kellogg package were made so that, in my idea, it was not a scale copy of the

Shredded Wheat Company package, I think it would still be wrong. It is not necessary. There is no need for them to put it on the market, no call for it. That is not the reason I did not put it in. I surely want to testify that I turned down a product I thought there was a demand for. I have done it in several cases. I know there is not a demand for Kellogg's, in my lifetime, anyway. I turned it down on the ethical ground I thought it was not fair to the National Biscuit Company, through my lifetime, anyway, if not perpetually.

I cannot say that I did have any feeling about stocking competitive Corn Flakes against the Kellogg Company. To be honest, I think Kellogg's Corn Flakes and Post Toasties are two different products. One is a lot thicker, the Post Toasties. In my opinion, they do not taste half as good. There is really no comparison between the two. If they made the same kind of thin corn flake which could not be distinguished from the other, I would refuse to stock them. On that ground, I think Kellogg should have a monopoly on them for all time. If they bring it out, put it on the market, and everybody is satisfied, I do not think they should come across and take advantage of their advertising. All the stock of corn flakes I have tried in the store are Kellogg's and Post Toasties. I have been offered many others.

I just like to have one brand and one kind of product, if it is a good one. That is a more convenient way for me in carrying on the grocery business. It prevents me from getting stocked up with a lot of different brands.

LUCIEN N. ROBINS.

Deposition taken at Boston, Massachusetts. November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery and provision business and have been at my present place about 20 years. I was in Charlestown, running a store there for about nine years, and was over there eighteen or nineteen years. During that period, I dealt in general lines of groceries, buying and selling, cereals among others.

I recognize the article taken from Plaintiff's Exhibit 1 as a shredded wheat biscuit, with which I have been familiar as long as I can remember. We sold it years ago in Charlestown; I should think, as long as I have been in the business. I should think, all the time I have known it, the biscuit has been about the same. It is about the same as I have always known it.

Shredded wheat means to me a breakfast food, a cereal. If a lady comes to my store or telephones and asks for a package of shredded wheat, we give her a package like Plaintiff's Exhibit 1. There is no other product I know of I use to fill an order for such an article. I know my customers, when they say shredded wheat, have in mind that package.

I have had occasion to know, over the period of years I have been handling it, that this product has been advertised, and it has always been one of our best sellers. We never have had any trouble with it in any way. I think there is a large demand for shredded wheat. I do not know exactly what would cause that demand, any more than what they like and want.

I have seen advertising of shredded wheat, consisting of a picture or representation of a dish with biscuit in it. I do not know if it was carried on a package. I recognize Plaintiff's Exhibit 10, as a package

that has been used by the Shredded Wheat Company, and I remember the picture of biscuit in a dish now. I do not know how long it has been used. It seems to me that is the package, as long as I have known it.

CROSS-EXAMINATION.

THE WITNESS: A National Biscuit salesman asked me to come to testify; wanted to know if I would come down to some kind of meeting; said there was some sort of meeting between Kellogg and National. He did not seem to know anything about what he wanted me to testify to.

I buy shredded wheat through the Boston Wholesale Grocery Company; that is, I did, but not now. We bought it until after National took the distribution over from the wholesale grocers, as a National Biscuit Company product. I cannot say how long ago it was added to the National Biscuit line. I have chain competition near me. They handle National Biscuit Shredded Wheat. I do not know how they buy it. I do not know their prices and discounts, any more than hearsay. I always supposed they bought the same.

I know nothing about Kellogg's biscuit, never have carried it in my store; do not think it was offered to me; will not say it has never been. I do not know much about the product, do not know that I have ever seen any. I handle Kellogg's Corn Flakes, which I think is a bigger seller than shredded wheat.

JAMES KERSHAW.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have a retail grocery and provision store, at 361 Broadway, Revere, Massachusetts.

where I have been about twenty years. I have been in retail grocery business twenty-five years.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known since I was a baby, old enough to eat it. I am a consumer of it as well as a dealer. I have to eat it. I used to like it but do not care much about it now. When I was a hungry boy, I liked it. During the time I have known it, its appearance has been about the same. I do not see any change. I remember the package. They always look alike to me. I never see any change in it at all.

When a customer asks for a package of shredded wheat in my store, that is all she gets, because that is all I ever handled. All I know of shredded wheat is that package. I have known it as shredded wheat ever since I can remember knowing anything. When I hear the expression shredded wheat, I go for that package. That is it. I never had anything but this shredded wheat in my store. When a customer comes in and says she wants shredded wheat, she always gets that. I had no other to see whether there was any special one or not; only they must like it. I sell a great deal of it. They do not bring it back and say they do not want it.

I do not know about the representation of a dish with biscuit in it. I recognize it by knowing the front with the building and so on. I do not recognize and have no recollection of Plaintiff's Exhibit 10.

CROSS-EXAMINATION.

THE WITNESS: I never heard of Kellogg's biscuit until I happened to see it today. I just saw it here. I might have had it offered to me. I turned down lots of salesmen, had a lot of trouble with them.

In Corn Flakes, we just have Kellogg's. My reason for having one brand is to keep it fresh. I have

much competition, but I meet it by keeping it fresh. I have my cake down to one brand and keep it fresh. It is desirable from our standpoint to keep one brand and keep it moving along. If I were offered another brand of shredded wheat, the chances are I would turn it down, for that reason. Generally speaking, I like price competition between different manufacturers.

I buy what I want through New England Stores Supply. If I cannot get it there, I buy it outside for cash. I buy shredded wheat directly from National Biscuit Company, not through any wholesaler or chain; because I can buy it from them with profit and sell it the same as they. I handle other products of the National line, cookies, which are delivered to me along with other products when I order them from the National.

I have been buying shredded wheat direct from National ever since they took it over. I have tried other brands of Corn Flakes, but they want Kellogg's.

HARRY ADRIAN.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery and provision business, at 102 Main Street, Malden, Massachusetts; having been there ten years, my entire grocery experience.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat, which I have known for about twenty years. I was a consumer of it before I was in the business and still use it. It is a favorite cereal in my home. I am familiar with the package and have known it for the same time.

If a customer asks for shredded wheat, we give her shredded wheat, for we have no other in the store. It means whole wheat biscuit, with a picture of Niagara Falls, with the factory. The name shredded wheat carries with it an indication of the fact that it is made in Niagara Falls.

We had a peculiar experience once, passing some shredded wheat which was not that product or in that box to a customer, and she said she wanted the one with the Falls on it, refusing it until I produced the other. What we tried to give her was Kellogg's Whole Wheat Biscuit. I had one case in the store and it lasted so long I would not reorder it. I had to discontinue the sale of the whole wheat biscuit because we do not like that long a turnover in the store. We ought to have cereals once a month.

I opened up a package of Kellogg's biscuit, took them home, and liked them very much. They are precisely the same, only it is probably smaller. In my experience, it was a trifle crisper when milk was poured over it; a very nice flavored biscuit.

If I had a Kellogg's biscuit on the table outside the package, I would think it was a Shredded Wheat Biscuit. It would be hard to differentiate them without the box.

I think the shredded wheat biscuit like those in Plaintiff's Exhibit 1 have a great reputation with the consuming public, because it has been before the public eye so long a time that one does not conceive of shredded wheat, unless it is in that style package.

The dish on the package of the shredded wheat is one of the outstanding features of shredded wheat, as long as I can remember. Even in my younger days at home, it had a dish with two biscuit.

I have seen a package like Plaintiff's Exhibit 14; only the one we had before had cellophane, and I do not believe there was a dish. Shredded wheat showed

through the cellophane, the window, which showed the ends of the biscuit inside the package. A person seeing that package in a pile, without reference to the reading matter on it, but seeing the saucer and the two biscuit, would get the impression it is shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I have no doubt it is shredded wheat. I was asked to come to testify today, by a representative of the National Biscuit Company. I also handle their other products. I used to buy shredded wheat through the wholesaler. Since National took it over, I buy it both ways, direct and sometimes through the wholesaler when he gives us a better trade than the National. I cannot conceive how they do it. A jobber will come in and say he will give us a good trade for shredded wheat, and we take a case. Maybe he is trying to get some money he needs or trying to get into the store to sell us other merchandise.

I do not know whether the National distributes its merchandise through wholesalers or not. Most of it is distributed by themselves. I handle several products in competition with National. We have Sunshine, Feldman Biscuit, Weston Biscuit. We have a special trade that asks for those. We have just Kellogg's Corn Flakes and Post Corn Flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not think one glancing at Exhibit 14 be led to believe it was the Niagara Falls Shredded Wheat; because, if they did not have Niagara Falls on, they would know it was not the shredded wheat they had always been buying. Maybe they would know it was a biscuit of the same kind. I had the occasion I spoke of, where a customer asked for shredded wheat, and I offered her Kellogg's. She looked the

package all over and said it was not the biscuit she wanted: "I want it with the factory on."

RE-CROSS-EXAMINATION.

THE WITNESS: That one instance is the only one I recall. I did not have shredded wheat, and I did not want to lose the sale. We had just one case of Kellogg's biscuit. It was a slow seller, so I did not want it in the store.

W. A. DOYLE.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am now demonstrator on shredded wheat and cereal for National Biscuit Company, with whom I have been about three months. Before, I was with Arbuckle Coffee Company in New York City. We have just been going from store to store here, where they designate.

I am familiar with shredded wheat, having known it ever since I have been able to talk and see things; all my life. I recognize Plaintiff's Exhibit 1 and contents as shredded wheat, that I said I have known all my life. It is just exactly the same form and appearance of biscuit as I knew when I was young.

I know shredded wheat has a reputation with the public, from my experience in purchasing it; it is the only shredded wheat I ever knew, the only box I would ever accept as shredded wheat. The same applies to the public at large. The good will of the public is in Shredded Wheat; and there is nothing else you could call shredded wheat.

I had breakfast at the Biltmore Hotel at Providence, Rhode Island, November 7, 1932, and ordered a

serving of shredded wheat. They brought me a package of Kellogg's biscuit in the original package. I told the girl that was not the shredded wheat I wanted. She said, "That is the shredded wheat we serve." I did not eat it; but I took the package and the menu they listed it on along with the name. Plaintiff's Exhibit 16 is the package and Plaintiff's Exhibit 17 the menu I took at that time.

I had a similar experience last summer, while I was connected with Arbuckle Coffee in New York. Mr. Kenney and I were at breakfast in Doukas Cafe, Keene, New Hampshire. We ordered shredded wheat. A gentleman who I think was the proprietor brought a serving of Kellogg's biscuit. We objected to it and said it was not shredded wheat. It was in the package. He insisted it was shredded wheat. We went into lengthy detail about it. He also stated Kellogg had bought out Shredded Wheat Company and that that was the shredded wheat.

We did not succeed in getting anything else. He did not even state it was owned by National. His honest statement was that the Kellogg Company had bought it out. I knew that was not so. I did not keep the package.

I recall the picture of a dish with two biscuit, on shredded wheat packages, similar to Plaintiff's Exhibit 10. That was there for maybe fifteen years. I think I remember it up to a couple of years ago. Then it was not on. Recently, it has come back. There was always that association of the dish with two biscuit, on the package.

I observe the dish with biscuit on Plaintiff's Exhibit 14. I have seen the Kellogg package before. As a cereal man, I would say there was great possibility of the public being deceived thereby. The dish with two biscuit certainly looks as if it must have been taken from the old shredded wheat package. That would be

my belief. In fact, I have heard a few comments about that.

CROSS-EXAMINATION.

THE WITNESS: I know Mr. James F. O'Brien; knew him while he was with Arbuckle Brothers. I did not go with the National when he did. He was with them quite some time. I only came here recently, two and a half or three months ago.

The only practice I would have is, if I were to order shredded wheat, I would want shredded wheat. If they served me Kellogg's I would not take it.

When I told the man at Keene it was not shredded wheat, I meant it was not the shredded wheat made by the Niagara Falls concern. He said nothing about it being made at Battle Creek. He said it was shredded wheat. I doubted that it was shredded wheat, because I was always able to tell shredded wheat. I knew the exact biscuit, could pick it out of any biscuit.

I have eaten the Kellogg product, which is a whole wheat biscuit. It is not shredded wheat. I could not say if it is a shredded whole wheat biscuit. I call the product in Plaintiff's Exhibit 1 shredded wheat biscuit. Not being really familiar with the Kellogg biscuit, I could not tell you what it is, not being posted about the making of it.

In Plaintiff's Exhibit 1 is shredded wheat. I do not know anything about the manufacturing process. If I asked for shredded wheat, I would want it served to me.

I have only been with National two and a half months. Did not come with them through O'Brien, only as demonstrator, not really being paid by the company. From my own experience, I cannot say if the shredded wheat biscuit is made by shredding wheat and forming it into a biscuit and baking it. All I can say is from eating shredded wheat.

THOMAS ROGER KENNEY.

Deposition taken at Boston, Massachusetts,
November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the employ of cereal division, National Biscuit Company, and have been for six months; in cereal business for twenty years. Was with Kellogg Company about fifteen years; then with Arbuckle Brothers, previous to National.

I have been familiar with shredded wheat all my life. Shredded wheat means to me the shredded wheat biscuit. The only association I would have with the term shredded wheat would be the Shredded Wheat Biscuit put out by the National Biscuit Company.

In August of this year I was in Doukas Cafe, Keene, New Hampshire, asked for shredded wheat, and was served Kellogg's biscuit. I told the waiter that was not shredded wheat, was not what I wanted. He insisted it was shredded wheat, the only shredded wheat he had. To convince me it was, he told me the Kellogg Company had bought out the Shredded Wheat Company and was now putting the biscuit out in this package and in this form. I explained who I was and my connection with the National, and told him he was wrong, that shredded wheat was still being put out, as it always was, and the package he had served me was not shredded wheat.

CROSS-EXAMINATION.

THE WITNESS: I meant that it was not shredded wheat, by the term that shredded wheat implied. There was never any qualification as to shredded wheat. It was shredded wheat, always, just a regular shredded wheat biscuit.

I would describe the Kellogg product I was served as a whole wheat biscuit, not known as shredded wheat

biscuit. It was a solid biscuit, not what you might call a raised biscuit. I knew it had entirely different physical properties from the biscuit the Shredded Wheat Company made, because he served it to me in a Kellogg package. I did not see the biscuit inside; I refused the package. Mr. Doyle was with me then. We ate breakfast together. I did not eat any shredded wheat in that restaurant that day. I went somewhere else and got shredded wheat.

We sold this man at Keene shredded wheat. He still had Kellogg's biscuit there, but we sold him shredded wheat made in Niagara Falls and sold it in two or three other places. It is not my position or work to and I am not going around the country for the National Biscuit Company telling people that Kellogg's product is not a shredded whole wheat biscuit.

I have seen the Kellogg biscuit outside the package; but I say that, physically, there is no resemblance at all between the Kellogg product and the Niagara Falls product. I know how shredded wheat is made. I believe the two products are made differently. I do not know exactly the difference. I never associated the two together.

The time Doukas, at Keene, tried to tell me Kellogg's biscuit was a shredded wheat biscuit is the first I had heard of any association between that biscuit and the Niagara Falls biscuit. He told me he had been informed Kellogg had taken over the Shredded Wheat line. I was with National at the time; before that, with Arbuckle Brothers, and James F. O'Brien was with them then, and I knew him. I came into National through him.

I was with the Kellogg Company from 1914 to 1929. I have sold some Kellogg whole wheat biscuit, when it was a flat biscuit, when it was on the market, not as late as 1929. O'Brien was not with Kellogg in 1929. I think he left them in December, 1928. When I was with

Kellogg, I knew we had a Whole Wheat Biscuit, but we never called it a shredded wheat biscuit.

I have seen a package like Defendant's Exhibit 5. That was only on the market a short time when they changed it. I knew of the package, but we were instructed to discontinue to refer to the biscuit that way. I am positive I never, in any way, thought of the Kellogg product as being physically a shredded wheat product. We always associated it more with Triscuit than with Shredded Wheat Biscuit. I refer now to the product marketed in cartons like Defendant's Exhibit 5.

Stipulated that each of the following witnesses:

I. Loss, 124 North Street, Salem;
Alexander Lager, 79 Leach Street, Salem;
Charles Goldberg, 107 School Street, Salem;
George Quint, 47 Margin Street, Peabody;
A. J. Ayotte, 247 Jefferson Avenue, Salem;
R. C. Smiley, 86 North Street, Salem;
Samuel Wallace, 123 Hale Street, Beverly;
A. Nelson, 944 Broadway, Everett;
Donald Black, 681 Main Street, Melrose;
Peter Tolan, 213 Franklin Street, Wollaston;
G. O'Brien, 1911 Dorchester Ave., Dorchester;
and
Thomas Cafferalla, 77 Newbury Avenue, Atlantic;

would testify, if called, that he is, a retail grocer in or about Boston, handles Shredded Wheat of the National Biscuit Company, formerly made by Shredded Wheat Company; has known it for several years, and, when customers ask for shredded wheat, the order is always filled with the product of the plaintiff.

MRS. GRACE DARLING.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housekeeper in Wollaston, Mass., and have a son, sixteen years old. I am familiar with shredded wheat, having used it since my son was four months old.

I recognize Plaintiff's Exhibit 1, having bought a good many of them; it is the package in which I have been accustomed to purchase shredded wheat.

In October of this year, I went to the Quiney Market, as I do Saturdays. As I went up the aisle, a clerk held a package out. I did not see the name but what I supposed was shedded wheat. I was out of shedded wheat, and I wanted some, because I am never, never without it. I gave him my traveler and said, "Send it up;" and thought no more about it.

Q. 13. Let me ask you this: When you say you saw what you thought was shredded wheat, do you mean that the words *shredded wheat* were on it?

A. No. I saw this picture there, and I supposed it was shedded wheat. I did not see the name.

Q. 14. You saw the picture, but you did not see the name?

A. No.

Q. 15. Was that the box, Plaintiff's Exhibit No. 14?

A. Yes, that was it.

Q. 16. But you did not read it?

A. I did not read it as carefully as now.

Q. 17. What happened then?

A. I went away that night, and I did not come back home until the next day, and he always comes up to see me; and he started to make a dreadful fuss about the

shedded wheat, and how he wondered where I got it, and what is the matter with it, and why I did not get shedded wheat; and I said, "It is shedded wheat." And he said, "It is not shedded wheat; it is straw." And I said, "No? Oh, well, it is all right." And he kept on fussing and fussing about it; and he asked me that I would not get him any more. I kind of forgot it and went out to the store and ordered some more shedded wheat, and the box of shedded wheat disappeared. I do not know where it went to. I am sure I do not know, and that was——

Q. 18. Was that the first time you had received anything different from that which you had been accustomed to receive?

A. I had never seen a substitute in all the years that I had bought shedded wheat. That is the first time I had seen a substitute for shedded wheat. That is, I presume, the reason why I did not stop to look at it and read it.

Q. 19. So you had purchased shredded wheat for a number of years?

A. Since he was four months old. That is all I had, nothing else for him.

Q. 20. And he has used it constantly all during that time?

A. Yes, we had it all the time.

CROSS EXAMINATION.

XQ. 47. It is perfectly obvious to me that your son did not think he was getting the product he had been getting.

A. No, he said it was straw and he did not want any more of it. Well, I said, "You do not need to have any more of it." I did not even look at the name. I just saw the picture there while I was going up the aisle. I did not want to have to go all the way back to the other corner where I would have to go to get it, and I just passed the slip in, as I went by.

XQ. 48. And at that time, you think it was this same package?

A. Yes, this same package.

XQ. 49. Referring to Plaintiff's Exhibit No. 14?

A. Yes.

MR. CLARKE: That is all.

RE-DIRECT EXAMINATION.

RDQ. 53. You saw the package?

A. I saw the shedded wheat, you see. I had to have it Saturday night. Saturday afternoon, I had to have the shedded wheat. That is all I did see.

RDQ. 54. Do you mean you saw the name?

A. No, I saw the picture of shedded wheat. I did not look at the name, you know, because, in all the years I have bought shedded wheat, I have never seen a substitute for it; and I suppose that is why I did it.

RE-CROSS-EXAMINATION.

RXQ. 55. Have you a husband?

A. I just buried my husband.

THE WITNESS: He was a minister. I do not approve of the manufacture of shredded wheat by more than one concern for my home. I am not speaking generally, but I would not use it in my home.

PRESTON DARLING.

Deposition taken at Boston, Massachusetts, November 29, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am sixteen. My mother just testified. I have eaten it ever since I can remember. I recognize the package, Plaintiff's Exhibit 1, it is

shredded wheat. I recognize the biscuit in it as the biscuit I always have.

Plaintiff's Exhibit 14 is the package sent home that day. I recognize it. We usually eat shredded wheat biscuit for breakfast with milk and sugar; sometimes eat it dry with butter on.

I ate the Kellogg biscuit both ways; first with butter. I did not like it. It cut my tongue. I tried it for breakfast with milk, I think. I only ate two out of the package.

CROSS-EXAMINATION.

THE WITNESS: I do not know what became of the rest; but I think my sister's dog likes it and I think that is where it went. I do not know if she tried any. My sister does not live with us. I do not know how she got it. They take the dog to our house quite often. That must have been when the dog got it.

Then I wrote this message to National, that I had been eating shedded wheat, my mother said, ever since I was four months old; that she brought home a new kind, which looked as if it would pass for shedded wheat, but it did not taste like it. We got an answer from somebody who said they were glad to hear from satisfied customers. I do not know what else they said. Some fellow came to see me, and then Mr. Savage saw me. Sometimes, when shredded wheat is gone, I have to eat some other cereal.

The Kellogg biscuit cut my tongue just enough to make you know it was not good, that it was not showing up very good. I do not know if I ever had shredded wheat hurt my tongue in any other way. It breaks up. This stuff is just like wire. I knew right away I was getting another product.

HAROLD A. DAGGETT.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: My family live on Cape Cod. I sleep around here, where I happen to be. I am a salesman of the National Biscuit Company, my duties requiring me to travel, on the road all the time. In the course of my work, I have found demonstrations of Kellogg's products.

In October, I was at Colodney's Market, in Burlington, conducting a sale of Wheatsworth. Next to me was the Kellogg demonstrator, a woman, selling a package of Wheat Flakes, a package of Rice Crispies, and a package of Pep, the three for 29 cents, and she stated she was giving a package of shredded wheat free with each purchase. I saw what she was giving as shredded wheat. It was Kellogg's Whole Wheat Biscuit. I saw her hand that out several times, in my presence.

CROSS-EXAMINATION.

THE WITNESS: I think her name was Brownell. She demonstrates for them here, has been with Kellogg for some time. I have seen her here for them before. She told me she worked for them; does practically all their demonstrating here. She is a short woman. I am not positive of the name.

XQ. 18. What language did she use in demonstration? How did she talk?

A. She would say, "We have a value here today. A package of Wheat Flakes and a package of Crispies, and a package of Pep, all for twenty-nine cents; and we are giving you a package of shredded wheat free."

XQ. 19. You are quite sure that that was the language she used? Are you sure she did not say Kellogg's Shredded Wheat?

A. No, she said, "We are giving you a package of shredded wheat."

XQ. 20. How many times did you hear her say that?

A. Well, quite a few times; because, naturally, I pricked up my ears when I heard her say shredded wheat.

XQ. 22. What kind of package was it that she gave out? A Kellogg package or—

A. A Kellogg's Whole Wheat Biscuit, you know, the regular package that they have.

XQ. 23. And you say that that was the package that she was giving out?

A. Oh, yes, I would say that that was the package that she was giving out.

XQ. 24. And that package was unwrapped, was it?

A. What do you mean?

XQ. 25. It must have been unwrapped, because you saw it.

A. Well, she had one of the little isinglass packages, you know. There is one little package that has isinglass in the center of it. She had that right there, you see.

XQ. 26. Was it a package of the whole wheat biscuit?

A. Yes, it was that. She would take it from her stock there.

XQ. 27. So she had a stock piled up there?

A. Well, you see, she said that they sold some four hundred packages.

XQ. 28. How was that stand arranged?

A. Well, there was a package of biscuit here, and the packages—one of those little display stands, with a pile of each of them there.

XQ. 29. They were prominently displayed?

A. Oh, yes, prominently displayed.

THE WITNESS: I kind of joked with her, told her that was not Shredded Wheat. One of the customers turned it back and said, "That is not shredded wheat. I do not like it." The woman had tried it, and I heard her say that. The woman would not buy it. A lot of them took it and did not know the difference. They had had it, but, like a lot of other things, I do not know where it is carelessness or not. When I say it was not shredded wheat she was selling, I mean it was not Niagara Falls Shredded Wheat. I mean to say the shredded wheat I know is the shredded wheat I have had since I was a kid, made at Niagara Falls.

I am not a production man, and I do not pretend to know whether it is possible to have shredded wheat made anywhere except at Niagara Falls. I have eaten Kellogg's biscuit, and I cannot say it was not shredded wheat. As a matter of fact, I know nothing about it. When I am talking about shredded wheat, I am talking about the shredded wheat I have known. I did not talk to the woman who handed it back, at all. I never spread around that Kellogg's biscuit is not shredded wheat. I never knock anybody. There has never been a National man even mentioned Kellogg's. We are too busy selling our own products.

BENJAMIN HARRISON SHARPLEY.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a restaurant proprietor, having been such two months. I lived in Burlington all my life, have been chef, and steward in hotels. I recently purchased a restaurant at 150 Church Street, Burlington, and ordered some supplies. I am familiar with shredded wheat, and have been for twenty-five to

twenty-eight years. All I know about it is that it is a very healthful, delicious breakfast. I know the Niagara Falls Shredded Wheat Company really puts out the finest cereal in domestic commerce. I have known that ever since I have kept a hotel.

I ordered shredded wheat for my new restaurant, at the Burlington Grocery, wholesale. I received Kellogg's wheat biscuit substitute. I ordered the real Shredded Wheat Biscuit, Niagara Falls, emphasized that in my order. I got the carton, photograph of which is marked Plaintiff's Exhibit 18, being case No. 3221-24.

I obtained from National some menu cards for my restaurant, like the one you show me, carrying printed on the bottom the words *shredded wheat*.

We still have the shipment of Kellogg's Whole Wheat Biscuit on hand, having served only an order or two since we got it. The help have eaten some of the rest, to get it out of the way. When a customer calls for shredded wheat, I give him the whole wheat biscuit. One occasion, a customer said, "No, have you got the real shredded wheat?" I said, "That is real shredded wheat." And he said, "No, that is a whole wheat biscuit. I want shredded wheat. If that is what you call shredded wheat, that is too tough."

CROSS-EXAMINATION.

THE WITNESS: I think we served an order or two of Kellogg's biscuit in our restaurant. I still have some on hand. It is on exhibition there. If our trade want it, all right, it is there.

I have Niagara Falls Shredded Wheat now and did have it. I am serving two kinds of shredded wheat now, whole wheat and shredded wheat.

I do not believe I have specially noticed the picture of Niagara Falls on the shredded wheat package. I

know the Niagara Falls Shredded Wheat Company puts out the finest cereal. I spoke of it as that, because it stated Niagara Falls on there. In saying that, I associated the picture of Niagara Falls with a picture of shredded wheat on that first product. I remember seeing the picture of the Shredded Wheat factory at Niagara Falls, I guess, away back.

I did not see that the Kellogg biscuit was not the Niagara Falls Shredded Wheat until it was up on the shelf. Then a customer gave the girl an argument. I thought the Kellogg Whole Wheat package was a Niagara Falls package. I saw the difference, noticed that right away. This customer started the argument my first week in the restaurant, say between the 17th and the 23rd. The girl put the whole wheat biscuit down, and he said, "I want some shredded wheat." The girl insisted that he got it, but he said, "No, that is Whole Wheat. Don't you know what shredded wheat is?" Then I snapped into it. That roused me. I overheard it. I said, "No, that is not real Niagara Falls, but a different kind of shredded wheat biscuit." He said, "I want Niagara Falls. It is made in Niagara Falls. That tastes more like baled hay."

When he said it was whole wheat biscuit, he had the carton in front of him. The girl simply opens it up and hands it to him. He handles it himself. The girls are not allowed to touch that. It is a little individual carton, holding two whole wheat biscuit. The girls were serving it in those cartons, marked Kellogg's Whole Wheat Biscuit. A customer said it was not Niagara Falls Shredded Wheat. I explained it was a different kind of Shredded Wheat, made at Battle Creek, that I had ordered Shredded Wheat and had not yet received it; that was all I had that morning, and I would see I had it in stock. He said it tasted like baled hay. I was very busy, so I do not remember all that took place.

I had no complaints from my help about eating Whole Wheat Biscuit. You would not get it from them, anyway. I have tried it myself. There is as much difference as day and night between the two. I could tell the difference blindfolded, between the Kellogg product and the Niagara Falls product.

ALEXANDER VERRET.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer at 112 Church Street, Burlington, in business for myself for thirteen years, worked in grocery store in Burlington twenty-nine years. I carry a full line of groceries, including cereals.

I recognize the article taken from Plaintiff's Exhibit 1 as shredded wheat biscuit, which I have known for twenty-nine years. During that period, the general appearance, form and size of the biscuit has been the same. My customers ask for shredded wheat biscuit and I give them a biscuit like that in Plaintiff's Exhibit 1. I recognize the package, with the picture of Niagara Falls. I have been familiar with it about twenty-nine years, and it has been substantially the same in form during that time.

I have seen in shredded wheat advertising a dish with two biscuit in it, as on Plaintiff's Exhibit 10. I remember seeing that for a long while. Shredded wheat and the name shredded wheat have a reputation among the purchasing public. When a customer asks for shredded wheat, I believe she means Niagara Shredded Wheat. It is the one that has been identified with the package with Niagara Falls on it.

CROSS-EXAMINATION.

THE WITNESS: I have handled Kellogg's biscuit. We carry it in cartons like Plaintiff's Exhibit 18. We do not supply the small two-biscuit cartons to the restaurant trade. I still carry Kellogg's biscuit and deliver it to customers who ask for Kellogg's whole wheat. Some do ask for Kellogg's Whole Wheat. If a customer asked me for Kellogg's Shredded Wheat, I would give them Kellogg's Shredded Wheat. I have no doubt about the Kellogg product being a shredded wheat product made by Kellogg. I have been handling the Kellogg product two or three years, and I buy it through wholesalers.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not sell many Kellogg's Whole Wheat Biscuit.

FREDERICK E. BLAIS.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, purchasing my supplies from Burlington wholesalers, Vermont Food and Burlington Grocery. I ordered shredded wheat from Burlington Grocery Company two or three weeks ago and got Kellogg's Whole Wheat, the package, Plaintiff's Exhibit 18. I wrote my name on top to identify it down to the agency. That is my signature. I went there and told him I wanted a case of shredded wheat and ordered some other stuff, too. There were no ifs and ands. When I got to the stock room, I got a case of this. I had a wagon there to take it away. My order for shredded wheat was filled with Plaintiff's Exhibit 18.

CROSS-EXAMINATION.

THE WITNESS: I did not know whether they had any Niagara Falls Shredded Wheat in stock and could not tell you if they had been cut off from supplies of Niagara Shredded Wheat. When I saw the Kellogg carton, I knew it was a Kellogg product and not Niagara Falls Shredded Wheat. I have been in business about six years and dealing in Kellogg products all that time.

After getting the case of whole wheat biscuit, I had to go by the National Biscuit agency where my brother is shipping clerk. I told him I had ordered a case of shredded wheat and gotten this from the Burlington Grocery. He told me to drop it there, which I did. Some man from the National paid me for the case. It was not my brother asked me to buy this case, but the other fellow told me to buy a case of shredded wheat and, no matter what kind of case I got, to bring it to him. He said to ask for a case of shredded wheat, and, if I got a case of Kellogg's, to bring it to him. He asked me first where I usually buy my groceries. I told him I got some from Burlington Grocery and some from Vermont Food. So I went to Burlington Grocery. I knew nothing about whether they had cut off the Burlington Grocery as a wholesale dealer, and he did not tell me.

I handle both kinds of shredded wheat, Plaintiff's Exhibit 14 and Plaintiff's Exhibit 18 in my store. I have handled this one, like Plaintiff's Exhibit 18, only in the last two or three months. I do not sell a great lot of it; because, when they ask me for shredded wheat, I always push the Niagara Falls one. I do not care about selling the other. They had a kind of sale. A certain percentage of sales was going for the benefit of Veterans of Foreign Wars; and they asked us, to oblige them, to get a full line in. That is the first time

I had it. The Kellogg salesman asked me to take the whole line, because I did not handle Whole Wheat or Kaffee Hag. We got them from them then.

I now buy my Niagara Falls shredded wheat from the National Biscuit Company and buy and handle their whole line, one hundred per cent. I handle no cookies or crackers except the National. I get no special discounts except the regular 10 per cent. I handle the National line because I think it better; just on the quality of the goods. The only competitor to the National line in my store is Kellogg's Whole Wheat Biscuit; otherwise, I have a hundred per cent. National products. The other products I buy from wholesale grocers. I buy the Niagara Falls Shredded Wheat from the National Biscuit Company, and they deliver it to me.

I am not a member of any chain store organization. The Reed Murdock salesman has not come over yet, but National has promised that, through him, it will get in touch with me and give me a special extra seven and a half per cent. discount.

I was not involved in the old discount fight between grocers and the National some years ago. I did know, however, they gave preferential treatment to chain stores.

RALPH THAYER.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a contractor and builder. Sometime last month, November, 1932, I went in a restaurant on Church Street, the Vermont Lunch, and called for a serving of shredded wheat biscuit. She took down a small box of Kellogg's biscuit, opened it and brought it to me. I said, "This is not shredded wheat, is it?" She said, "No, it is not; it is Whole

Wheat, but it is the same thing, made just the same way and of the same stuff, just as good, if not better." I said, "I want shredded wheat." She said, I have not got it; this is the same thing." I asked to see the box, and she took another box and set it up. I said, "I want the box this came out of," and she got it. Then she wanted to know if I did not call it just as good, just the same as the other.

I ate the Kellogg biscuit. I did not see any menu on the counter. The box that was served me, which contained two small biscuit, is Plaintiff's Exhibit 19.

CROSS-EXAMINATION.

THE WITNESS: I ate the Kellogg biscuit served in the little Kellogg package. The girl asked if I liked it. I told her I could not see any difference, but I always used the other and insisted on it. I have not used Kellogg's since; that is the only time I had it. I have not been in that restaurant since. If I go to a place, ask for something, and they refuse it, if that is all they serve, I do not care to go there again.

I did not notice any difference by eating it. I have no relatives here connected with shredded wheat. I have been working there in that lunch room. No shredded wheat person was with me when I bought it. I have known Mr. Bradbury, of the National, and he spoke to me about going in there at first. Then, I told him I knew them in there and I would go in. He suggested that I go into the Vermont lunch. I think he did tell me to tell them the Kellogg product was not shredded wheat. I told them it was not; and they said it was not shredded wheat, but it was just the same thing, made by the same process and of the same material. I do not think we ever used any by Kellogg's before. It was at Mr. Bradbury's suggestion I brought away the carton that was served me. I had never seen the Kellogg's Whole Wheat carton before this inci-

dent in the Vermont lunch. I was served with two biscuit. I knew before that Kellogg's had a shredded wheat biscuit on the market, but supposed it was one biscuit.

I know Mr. Bradbury is the National representative in this vicinity. He had spoken to me about this controversy before this incident in the Vermont lunch. I never worked for the National, but I had worked in the Vermont lunch, making switches, and so on. I had known Mr. Bradbury before then, went down one night and put up an elevator, did work around there. Through him I knew about the Shredded Wheat-Kellogg controversy, but not very much until I had been in there. Then he asked me what was said and told me what was going on.

RE-DIRECT EXAMINATION.

THE WITNESS: I have been familiar with shredded wheat biscuit ever since I came to Burlington, four or five years. The first place I boarded that is about all we had for breakfast for a year and a half. When I went back up country, they had shredded wheat for breakfast.

ERNEST BRADBURY.

Deposition taken at Burlington, Vermont, December 7, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am National Biscuit Company sales manager in Burlington and have been with them sixteen or seventeen years. At noon yesterday, I was in Burlington with Mr. Vilas, Mr. Smith and Mr. Atcheson. The four of us lunched at the Montpelier Tavern. Mr. Vilas ordered shredded wheat and was served Kellogg's Whole Wheat Biscuit in the Kellogg

package, individual size. Mr. Vilas mentioned the fact it was not shredded wheat; and the young lady said, "It is." Mr. Vilas said, "I am sorry; but that is not shredded wheat." The young lady replied: "Oh, you want the other biscuit," and she grabbed up the Kellogg biscuit, took it back, and served Niagara Falls Shredded Wheat to Mr. Vilas, in a dish out of a package, one biscuit. There was a menu card on the table. Plaintiff's Exhibit 20 was that menu.

This morning, I stopped with Mr. Vilas to take him to breakfast, at Dorn's Cafe, in the New Sherwood Hotel. He ordered shredded wheat and was served Kellogg's biscuit out of the package, two biscuits in a dish out of the package. Mr. Vilas examined them and said to the girl: "Why, that is not shredded wheat!" The young lady stated, as was the case in Montpelier Tavern, "Yes, that is shredded wheat." Mr. Vilas said, "I am sorry, but it is not." Then she said, "Just a minute. You want the other biscuit." She reached down and said, "This is what you want," and pulled out a package of Niagara Falls Shredded Wheat, individual size, opened it up, and served the two Niagara Falls biscuit in a dish without the package. I happened to notice, when she took the two first biscuit out, which were Kellogg's biscuit, when she went back to change them, she took the two biscuit out of the dish, and laid them on the counter. She then took the two Niagara Falls biscuit out of the individual package and put them in the dish, leaving the Niagara Falls package lying beside these other biscuit.

Then, she served the Niagara Falls biscuit to Mr. Vilas. I sat there waiting for Mr. Vilas to get through. I happened to notice she picked up the two Kellogg's biscuit and put them in the Niagara Falls package, brought the package over, and put it down where she keeps her shredded wheat cereal. We obtained that

package just as she put it down. It is Plaintiff's Exhibit 21, which is exactly in the condition in which it was placed by the waitress in the stock, on the shelf. It has not been touched. The two biscuit now in it are the biscuit first served to Mr. Vilas in the dish. I saw them put in there. They were served to Mr. Vilas from outside the package.

I am familiar with the Vermont lunch, Mr. Sharp-ley's restaurant. They have a supply of menu cards furnished by the National Biscuit Company, of which Plaintiff's Exhibit 22 is one, which I identify as having been taken by me from Mr. Sharp-ley's restaurant.

Three or four weeks ago, I stopped in at Dorn's Cafe to have a light lunch. I like shredded wheat very much, and I ordered it. I knew they had both shredded wheat and Kellogg's biscuit, and I ordered shredded wheat. The girl picked up Kellogg's biscuit and served it to me out of the individual package, two biscuit in a bowl. I told her right away that it was not shredded wheat, and, as we have stated before, she said, "That is shredded wheat." I told her she was mistaken, it was not and she was doing a very wrong thing by substituting another item when shredded wheat was called for.

Then, a lady who is cashier or something at the door seemed to take quite a little interest in it. She spoke up, asked me what the trouble was. I told her I called for shredded wheat and, though they had shredded wheat on the shelf, the girl had picked up Kellogg's biscuit. In the conversation the remark was made that Kellogg's salesmen were after the girls all the time to push their biscuit out when shredded wheat was called for. This young lady acting as cashier said, "Thank you very much for calling my attention to it. We will have it corrected."

In the instance I just described, I saw the waitress take a package of Kellogg's from the shelf. I saw

her this morning take it, also. In both instances, the biscuit were taken from the package and served in a dish.

CROSS-EXAMINATION.

THE WITNESS: Mr. Vilas is staying at the Vermont Hotel on the trip to Burlington. I drove around and got him this morning. I suggested we go out to breakfast elsewhere and drove to the Dorn's Cafe, where the incident I have related occurred. This was the same cafe where I dined under similar circumstances two or three weeks ago. We sell Niagara Falls Shredded Wheat to them.

Before I went in there then, I believed they were handling Kellogg's product, because, along in September, they had not been purchasing Shredded Wheat, and I figured they would either have some Kellogg's biscuit left or would still be handling it. After September I sold them Shredded Wheat. I think we had sold them a little something before September, but not so much.

They were handling Kellogg's biscuit in that restaurant before I sold them Shredded Wheat. I stated, when Kellogg's was first handed to me in Dorn's, I told her at once it was not shredded wheat. I had ordered shredded wheat and saw her go directly over to the cereal section under the counter. Niagara Falls biscuit and Kellogg's biscuit were there. I saw her deliberately pick up Kellogg's biscuit. When I order shredded wheat, I want shredded wheat and not Whole Wheat Biscuit. The girl said: "That is shredded wheat, made by someone else." That is not literally true, to my idea. When I told her it was not shredded wheat, I meant it was not the Shredded Wheat I have known for years.

I do not tell people it is not Shredded Wheat of anyone's. The way I feel about it, it is not the

shredded wheat I have known. I do not know whether it is wheat. I do not question that it is. I do not say it is not shredded. I am not saying it is not in biscuit form. I say it is not shredded wheat biscuit. The only shredded wheat biscuit I have ever known is Niagara Falls Shredded Wheat.

As general manager of sales in this district, I make the statement that, if it is not Niagara Falls biscuit, it is not shredded wheat. That is true. When I order shredded wheat, I mean Niagara Falls Shredded Wheat.

Wherever I order shredded wheat, if it is not shredded wheat, I tell them so. I did nothing with this Kellogg product that was served me two or three weeks ago. I just let her take it back, and she brought me Niagara Falls Shredded Wheat. That was the same cafe to which I took Mr. Vilas this morning. I do not know the name of either the waitress or the cashier there.

Wherever restaurants want Shredded Wheat menus, we supply them, and we give them cards. We sell shredded wheat direct to the Dorn Cafe now, and we make deliveries direct. That is our general method of supplying the trade in this district.

I drove over with Mr. Vilas to Montpelier yesterday. I had had lunch at the Montpelier Tavern before. The other gentlemen drove over with us, and we had lunch together.

The National Biscuit Company, no longer, as far as I know, markets cartons with picture of a dish with two shredded wheat, as in Plaintiff's Exhibit 10. I have not seen one in a long time that way. All the cartons marketed by the plaintiff company, as far as I know, contain a picture of the Niagara Falls factory and on the end a picture of Niagara Falls, with the words: The Home of Shredded Wheat. The plaintiff distributes its product in two sizes of package, a large

carton with twelve biscuit, and individual cartons, containing two biscuit each.

So far as I know, the policy of the plaintiff company is to encourage the sale of individual cartons so far as restaurant or hotel trade is concerned.

I have been connected with the National Biscuit Company between sixteen and seventeen years. I was not in any way connected with the Shredded Wheat Company before the National Biscuit Company took over the Shredded Wheat Company a few years back.

HARRY J. SOOST.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery and meat business in Pittsburgh. I have been in this business all my life having been brought right up with it, ever since I was about six years old and have never done anything else. I carry a full line of groceries, including cereals and the like.

I recognize the article taken from Plaintiff's Exhibit No. 1 as being shredded wheat which I have known ever since it has been on the market about thirty-five or forty years. I know this article comes from Niagara Falls, New York, as I have seen it made, having visited the factory twice. The shredded wheat biscuit looks exactly like it always has and the carton in which it is packed is the same as it has been, as far back as I can remember, about twenty or twenty-five years.

Yes, I recognize Plaintiff's Exhibit No. 10 with a picture of a dish on it and some biscuit in the dish.

This panel on the cartons with the dish and the biscuit in it has been used for about ten or fifteen years. A long time ago we gave dishes—similar to the one on the package—away with shredded wheat. When our customers ask for Shredded Wheat we give them the Shredded Wheat made at Niagara Falls as we have never had anything else to give them and that particular shredded wheat is what our customers expect to receive.

The reputation of shredded wheat biscuit is very good and as long as I have dealt with the company they have occasionally sent a man around to see that the stock was all right and no complaints and I have had less trouble with Shredded Wheat than with any other breakfast food we ever handled.

Shredded Wheat has been well advertised and when anyone went to Niagara Falls the main thing to see was the Shredded Wheat factory.

CROSS-EXAMINATION.

THE WITNESS: I was at the Shredded Wheat factory twice and saw the biscuits made but I really do not remember what they were made of. Some people called them bales of straw or they would ask for the little bales of wheat.

There is no other name for biscuit put up with shredded wheat. I had never heard of Kellogg's shredded wheat and knew nothing about them until the last week or two. I have known the All Bran and have handled Kellogg's Corn Flakes and when a customer asks for Corn Flakes I give her Kellogg's but I have never seen Kellogg's Whole Wheat Biscuit. I have an idea that Kellogg's products are made up in New York State some place. I was one of the first grocers in Pittsburgh to handle their products and have done so ever since they have been on the market

but I have never seen any of Kellogg's Whole Wheat Biscuit and only heard of it recently when my brother-in-law told me that they were putting out a whole wheat biscuit. I had never seen one until just now looking at that package is the first time and they do look the same to me as shredded wheat.

MR. VILAS: Has that an exhibit number?

MR. CLARKE: The reference is to Defendant's Exhibit No. 4 for identification.

I recognize Defendant's Exhibit No. 4 as a Kellogg package by the Kellogg name on it and the color and arrangement suggests a Kellogg's Corn Flakes package.

I remember well seeing the picture of Niagara Falls on the Niagara Falls product and of the representation of the Falls on the end of the carton. They have always emphasized the fact that this biscuit was made at Niagara Falls and this fact is very generally known in the grocery trade.

For the last thirty-five or forty years I have purchased the biggest part of my Shredded Wheat supply from Weisbrod Wholesale Grocery, in Pittsburgh, from whom I can get about the best price. There was no change in the distribution of Niagara Shredded Wheat after the National Biscuit Company took it over, everything went along just about the same.

In addition to National Biscuit Company goods I handle some Beech Nut crackers. I have handled Loose-Wiles goods but not for the past five or six years.

RE-DIRECT EXAMINATION.

If I had a package like Defendant's Exhibit No. 4 for identification and a package like Plaintiff's Exhibit No. 1, side by side, I would have no doubt

in my mind as to which was which. My customers always study the package they are buying and would know the difference all right because we have handled this other package so long.

ALFRED F. BRAUN.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, in business about thirty years at the same place in Pittsburgh. Up to five years ago it was Stilpe & Brown and now I am in business for myself. I carry a regular grocery line including cereals. Yes, I recognize Plaintiff's Exhibit No. 1 as being shredded wheat, having eaten it at home quite often and I also carry it in the store and have carried it ever since we opened up about thirty years ago. When a customer asks for shredded wheat I give them shredded wheat in a package like Plaintiff's Exhibit No. 1. Plaintiff's Exhibit No. 10 is an old timer that was used ten or fifteen years back.

I recognize Defendant's Exhibit No. 4 as Kellogg's Whole Wheat Biscuit which we have carried for about a year.

I cannot say whether my customers would be familiar with the picture of the dish—probably some of the old-timers would recognize it.

CROSS-EXAMINATION.

I understand "shredded wheat" to be a wheat product made into biscuit form and shredded. I recognized that Kellogg's Whole Wheat biscuit was a shredded biscuit the first time I saw it. I know of no other way of describing this product and have never heard any other name applied to it.

I would not say that Shredded Wheat and Corn Flakes were both descriptive names. Shredded Wheat sounds different than Whole Wheat Biscuit, there might be a little confusion with some people. Corn Flakes would not be a special name because there are a great many corn flakes on the market. If a customer asks for corn flakes I would give them Kellogg's, it might happen that we would give them Post Toasties but that would be very seldom unless they specified Post Toasties.

I remember the picture of Niagara Falls on the Shredded Wheat package during all the time I have been familiar with it but I am not sure about the picture of the plant with the windows in it on the front face of the cartons. Plaintiff's Exhibit No. 10 seems a little strange, it does not seem to me that the picture of Niagara Falls has been on there long. The factory picture has always been on. I buy direct from National Biscuit Company and handle the rest of their line. I handle some Loose-Wiles goods, not quite as much as National.

I have handled Kellogg's corn flakes, bran products, Pep and whole wheat biscuits ever since we opened business.

RE-DIRECT EXAMINATION.

Yes, "Whole Wheat Biscuit" is another way of describing wheat in the form of a biscuit made of shreds.

RE-CROSS-EXAMINATION.

I would now know what was in a package with the name "Whole Wheat Biscuit" if I did not see the picture of Shredded Wheat on the package but previously if I had simply seen it marked "Whole Wheat Biscuit" I would have known it was a wheat biscuit, possibly made of wheat flour of any character. The first time I saw the Kellogg package if it was re-

ferred to as Kellogg's Shredded Wheat I expected to see a shredded biscuit something like the biscuit in Plaintiff's Exhibit No. 10.

EDWARD P. LOUGHREY.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have been a grocer for the past twenty-eight years, for the past eight years in business for myself during which time I have been selling a general line of groceries to consumers. During these eight years I have been buying groceries from wholesalers and jobbers and manufacturers including cereals such as corn flakes, bran flakes, shredded wheat, wheat es, Post Toasties, etc.

Plaintiff's Exhibit No. 1 is the shredded wheat product which I have been selling for twenty-eight years.

I never paid much attention to the packages but I do recall that at certain times of the year I would see a picture of a dish with strawberries on the shredded wheat. That took my eye because it always looked so doggoned good.

The biscuit taken from Plaintiff's Exhibit No. 1 looks like the shredded wheat which I have always sold for shredded wheat. It is the Niagara Falls Shredded Wheat which has always looked the same. I do not remember ever seeing Kellogg's shredded wheat. When I order shredded wheat I merely ask for a case of shredded wheat, meaning the National Shredded Wheat from Niagara Falls and this is what I always get. If a customer came in to my store and asked for shredded wheat I would give her the package like Plaintiff's Ex-

hibit 1, being the only package that I know as Shredded Wheat.

CROSS-EXAMINATION.

I knew the Kellogg Company were around selling a whole wheat biscuit but would not know just what that was, there being so many things whole wheat, but when you speak of Shredded Wheat Biscuit I would know it to be Niagara Falls Shredded Wheat.

The biscuit just taken from Kellogg's package I would sell for Whole Wheat Biscuit, that being what it is marked. I would not call them shredded wheat because I would not know them as that.

It may be possible for more than one manufacturer to make Shredded Wheat. I only know Kellogg's Corn Flakes in the trade. There are other kinds such as Post Toasties. I have heard of Jersey Corn Flakes but have never handled them. Kellogg's is not the only one that makes corn flakes but when a customer asks for corn flakes I give them Kellogg's, although I handle Post Toasties and Wheaties.

I have handled the Kellogg products since I have been in business for myself and knew of them when working with others in the business. While I have seen the Kellogg Whole Wheat cartons before now I have never seen the whole wheat biscuit. I have had a dozen packages in my store on consignment but could not sell them so exchanged them for something else.

From the time that I went to school and heard them talking of Shredded Wheat I remember seeing the picture of Niagara Falls on the face and panel of the carton. Kellogg's products, I believe, are manufactured in Battle Creek, Michigan.

I handle some of the National Biscuit Company cakes and their shredded wheat and purchase these directly from them. Also carry some Colonial crackers. I am an independent grocer not belonging to any chain.

Seeing the two biscuits together I would recognize that there are two different brands of shredded wheat. If I had Kellogg's product in stock and a customer asked for Kellogg's Shredded Wheat, I would ask her if that is what she wanted.

RE-DIRECT EXAMINATION.

I buy Kellogg's products through a jobber and National Biscuit Company products are delivered by their own wagons.

LEROY SHAFFER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: For about ten years in the one place in Pittsburgh I have been in the retail grocery, meat and vegetable business.

I recognize Plaintiff's Exhibit No. 1 as shredded wheat. The article taken out of the package is shredded wheat which I have eaten off and on for the last thirty years and the appearance of the biscuit has always been the same. I carry quite a line of cereals. We are right in a district there where people use cereals much more than do those in the cheaper neighborhoods. I handle shredded wheat which I purchase now from the National Biscuit Company. Before they distributed it I purchased it from wholesale grocers and ordered it as shredded wheat. In fact I had but one shredded wheat in mind. I did not always bring in the Niagara Shredded Wheat, I always just asked for shredded wheat and always got the shredded wheat that you have here. If a customer asked for shredded wheat we would give her the shredded wheat we have been

handling for years. Kellogg's have a Whole Wheat Biscuit which we would give out when someone asked for Kellogg's Whole Wheat Biscuit.

In 95 per cent. of the cases, customers asking for shredded wheat want the Niagara Shredded Wheat. Kellogg's Whole Wheat Biscuit are not as well known as their other products. The old carton with the plate or dish on was used for shredded wheat four or five years ago. I do not know exactly the number of years but probably until they changed to the new package marked Plaintiff's Exhibit No. 1.

CROSS-EXAMINATION.

In recent years the shredded wheat cartons have featured the Niagara Falls at both ends. I think I have known since I was a boy that this biscuit was made in Niagara Falls and some years ago I visited the factory myself.

I would not say that Niagara Falls has been emphasized and beaten into the trade but my idea is that that is the original Shredded Wheat. When Kellogg's came out I identified that as whole wheat biscuit. If a customer called up and asked for a package of Kellogg's Shredded Wheat we would ask her if she wanted Kellogg's Whole Wheat Biscuit, to be correct.

My definition of shredded wheat is that it is little shreds perhaps easier to digest.

Kellogg's is the chief brand of Corn Flakes and there are Post Toasties which do not conflict much with corn flakes. I have heard of the Jersey brand of corn flakes, they are made near here. It would indeed be news to me if I were told there were a hundred different kinds of corn flakes.

When a customer asks for corn flakes we give them Kellogg's Corn Flakes because that is what they expect to get. If a customer asked for Post Corn Flakes

I would ask her if she wanted Post Toasties. If she asked for Jersey Corn Flakes and I had them I would be glad to sell them. Kellogg's is a good line except the Whole Wheat Biscuit which is a poor seller compared to Shredded Wheat. I carry both brands to be fair to Kellogg's.

The National Biscuit Company man asked me if I cared to come down to testify. I have known for a long time that there was an infringement as to the name Shredded Wheat but it never concerned me a lot as we never had but the one shredded wheat.

I have never heard of Quaker Corn Flakes nor seen such a package. The Postum Company I have known since I have been in business and I guess it was a long time after I knew them as makers of cereals that they put out the toasted corn flakes. I did not go into the grocery end when I first started in business but the Post Toasties representative lived near me and he put in a line of Postum goods. I consider Post Toasties and corn flakes as two different cereals. If someone asked for Post's Corn Flakes I would ask if she wanted Post Toasties. Most people when they want corn flakes ask for Kellogg's Corn Flakes. If someone asked for Kellogg's Shredded Wheat I would tell them it was Kellogg's Whole Wheat Biscuit. I presume it would be possible to have a whole wheat biscuit in another form made of whole wheat flour or even whole wheat flakes.

I have seen the Kellogg Shredded Whole Wheat Biscuit package but I do not know whether I have ever had it in stock or not. I have never had a case of whole wheat biscuit in the store at one time as it is such a poor seller with us.

Since the National Biscuit Company took over the Shredded Wheat Company I buy direct from them as I can get quicker delivery and get the regular discount.

For the past year I belong to the Triangle Grocers Association.

When I first started in business I handled Loose-Wiles goods but no more unless Triangle has a special sale, in which case I may take a dozen with a guarantee for the sale. If they don't sell they go back.

JANE HESS WHITE (Mrs. Arthur White).

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and have been acquainted with Shredded Wheat about twelve or fifteen years and have used it about six or eight years, but not so much recently although my father uses it every morning. I have seen it manufactured, having been at the Niagara Falls factory about nine years ago.

When I see the words Shredded Wheat it always conveys to me the fact that it is made at Niagara Falls.

I went to purchase a package of Shredded Wheat last week and was given something else. This was in Duritsky's store on Elma Avenue, Uniontown. I asked for two or three articles first and then for shredded wheat. They gave me another product which I said was not Shredded Wheat, but was assured by both the lady and man in the store that it was shredded wheat, a smaller biscuit and more in a box. I proceeded to get the balance of my things and they wrote out the slip marking it "S. Wheat." I asked them to write out the full name of all articles purchased. What I was given was a package of Kellogg's Whole Wheat Biscuit. The sales slip and carton which you have are my receipt for the articles that I bought and the Kellogg Whole Wheat Biscuit carton. The biscuits I gave to

Mr. Moser, who is the Uniontown sales manager of National Biscuit Company. It was at his request that I made this purchase in a store I had never been in before. The sales slip is signed by Mrs. Mary Duritsky, who owns the store.

MR. SAVAGE: I offer in evidence, as Plaintiff's Exhibit No. 23, the sales slip concerning which the witness has just testified, and as Plaintiff's Exhibit No. 24, the Kellogg carton to which the witness has just referred.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 23"; and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 24.")

CROSS-EXAMINATION.

I have known Mr. Moser about fifteen years; he was sales manager when I first knew him and deposited in the bank where I was teller. I have no relatives connected with the National Biscuit Company and came into this case merely as a friend of Mr. Moser, who asked me to go to Duritsky's to make this purchase and I knew when they gave me Kellogg's Whole Wheat that it was not the product which Mr. Moser had told me to buy. This store is in my neighborhood and judging from the looks has a good reputation, but I never had any dealings with them. Mr. Moser asked me if I used shredded wheat and then asked that I buy a package at Duritsky's, which was the only store I went to. I recognized the package immediately as not being the Niagara Falls product and asked if that was Shredded Wheat and was told by both the lady and man that it was a smaller shredded wheat. The Niagara Falls Shredded Wheat is the only shredded wheat I had ever heard of and looking at the Kellogg's product I would not know now that it was shredded wheat be-

cause it is not marked on the box. I have not had much to do with shredded wheat the past few years, but previous to that my parents bought it and now I buy a box occasionally for my husband to eat. I am not familiar with any brands of corn flakes and I went to no other store but Duritsky's, where I had them write down the items I purchased. I occasionally do this because I buy for relief organizations and must show a slip of the purchases. I have never done any demonstration work for either National Biscuit Company or Shredded Wheat Company.

MRS. EDITH MOSER.

Deposition taken in Pittsburgh, Pennsylvania,
December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am the wife of Mr. Moser, agent of the National Biscuit Company at Uniontown, and was with Mrs. White when she made her purchases at Duritsky's. She purchased beans, potatoes, corn, etc., and then asked for a package of shredded wheat. On being handed the package she said "Is that shredded wheat," and was told that it was, but a smaller biscuit, and you got more in the box. The package she received was like that of Plaintiff's Exhibit No. 24. She took the package, paid for it and had the boy put the purchases in the car.

CROSS-EXAMINATION.

The party waiting on us at Duritsky's pointed to the picture on the front of the package and said "it is shredded wheat," "it is a smaller biscuit but they are packed more in the box," but kept the package in his hand.

Q. Did you have any doubt that the biscuit in this package were any different from the biscuit illustrated on the carton? That is, did you think that he did not know what he was talking about or that he was lying to you?

A. Well, I did think that it was not shredded wheat. The boxes were not lettered "shredded wheat." I thought to myself, then, "Why do these people say it was shredded wheat, when I could not see any "shredded wheat" on there.

Q. Does it not say "Made of deliciously flavored whole wheat shreds, double toasted"?

A. Yes, it does say that.

Q. And on the side of the carton, does it not say this: "This certified analysis, made by the Medical Arts Laboratory of Philadelphia, indicates the splendid food value of Kellogg's Shredded Whole Wheat Biscuit"?

I could not read the side of the package, only being able to read what the boy was holding up. I thought if there were shredded wheat in the package it should be marked on the outside. Kellogg's name was not mentioned in connection therewith, although I saw Kellogg's name on the package. This package I gave to Mr. Moser.

When we were handed the package we naturally looked for the large biscuit in the corner and not seeing it knew it was not the Niagara Falls Shredded Wheat, and the name Kellogg's Whole Wheat Biscuit meant nothing.

I had never been in Mrs. Duritsky's store before and had never heard my husband speak of her and did not know until last week why he wanted me to go there to make this purchase.

EDWARD TRESEER.

Deposition taken in Pittsburgh, Pennsylvania,
December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have been in the meat and grocery business for the past 32 years. For the past ten years I have carried a line of groceries, previously meats only. I do a retail business and carry a line of cereals. Plaintiff's Exhibit No. 1 is a package of Shredded Wheat and the contents Shredded Wheat Biscuit which I have known to be the same in form, shape and appearance for the past thirty years or more. We carry Shredded Wheat in our store and sell a lot of it. When a customer asks for shredded wheat we give her a package like Plaintiff's Exhibit No. 1 and never anything else. This is an old established product.

CROSS-EXAMINATION.

I came here at the request of Mr. Nasmith one of National Biscuit Company's salesmen from whom I buy crackers, etc. I have been dealing with the Biscuit Company about ten years. I handle Kellogg's Corn Flakes and Bran but have never handled their Whole Wheat Biscuit and have only heard of it within the past year, that is, I heard they were putting out a shredded wheat biscuit. I have always associated Shredded Wheat with Niagara Falls, their package has always looked the same to me.

I give my orders to the salesman and the goods are delivered by the National Biscuit Company's trucks. I buy some of their cookies, etc., and some of Loose-Wiles products. At one time I was tied up with the Royal Scarlet stores but no more.

This is the first time I have ever seen a Kellogg Shredded Wheat and I can see that it is not as large

it is smaller, shorter than the Niagara Falls Shredded Wheat. I am familiar with Kellogg's general type of carton for corn flakes, bran, etc., and would recognize the whole wheat biscuit carton as belonging to the Kellogg family as its red and green colors are very similar to their other packages.

MRS. IRMA COLLIFLOWER (Mrs. J. A. Colliflower)

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife and recognize Plaintiff's Exhibit No. 1 as a box of Shredded Wheat which I have known ever since I was a little girl. I buy it right along giving it to my children. When buying I ask for a box of Shredded Wheat and usually get the package similar to Plaintiff's Exhibit No. 1 with the exception of this one.

Q. Will you state the circumstances connected with this carton which you have just produced, stating where and when you got it and any other circumstances connected with it?

A. Well, I stopped at the L. H. Black Grocery at 601 Second Street, Juniata, Pennsylvania, and I asked for a box of Jell-O. And she did not have the Jell-O which I asked for. She said she had some gelatin. And I said, "All right." And she took time to explain about the Jell-O. Then I asked for a box of shredded wheat, and she gave me this. She said nothing about it, and I asked for a slip, and she handed us her name on the slip.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 25.")

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 26.")

I took the package, paid for it and nothing more was said. The words Shredded Wheat mean Niagara Falls Shredded Wheat to me and means a biscuit when broken is very tasty and palatable and is the only shredded wheat I have known and have cared to use. Any other product by that name would seem to me to be a misrepresentation.

CROSS-EXAMINATION.

The biscuit contained in Defendant's Exhibit No. 6 look like a small sized shredded wheat biscuit and a little dryer.

The National Biscuit Company Altoona salesman asked me to go into this particular store to make any purchase I desired and to buy a package of shredded wheat and to take what was given me. I had seen Kellogg's product on the shelves in stores and knew immediately that I was not being given the original Shredded Wheat as the carton did not contain a picture of the Falls nor was it marked "Home of the Shredded Wheat." I understood right away that she was giving me a product made by Kellogg Company. I was asked to make purchases at two other stores; at the first store I was told they had two brands, National and Kellogg's, which did I want. I asked for National and received it, taking it home and using it. The other package was turned over to the National Biscuit Company salesman and I did not see it again until today.

I am very familiar with Kellogg's Corn Flakes as I like them very much. As to the shredded wheat package one could easily be misled, if in a hurry, into thinking that Kellogg's package was the Niagara Falls Shredded Wheat. Of course, if one is expecting that they may get a substitution you would be most careful to see what you were getting, whereas if you were in a hurry you might receive another package without noticing the difference until you arrived home.

The other store I was asked to go to was the Clover Farm Store in Altoona.

I am not connected with or related to anyone in the National Biscuit Company. The name of the salesman who asked me to make these purchases is J. L. Black of Altoona whom I have known for several years, he explained at the time that he wanted me to go to Pittsburgh to act as a witness. After making the purchase I met him accidentally on the street and gave him my purchase.

RE-DIRECT EXAMINATION.

In the first store I dropped in they had one package in each shelf with both prices of merchandise showing and this was the store where they explained the difference between the two packages. I had never been in this store before. In the next store I made the purchase.

RE-CROSS-EXAMINATION.

I rarely have the wrong merchandise sent to me—I specify plainly what I want and if I did not get it, would send it back. If Kellogg's Shredded Wheat were sent me instead of Niagara Falls I would return it because the latter is what I like and what I would order. Occasionally I try a new product if it is explained to me and then if I don't like it I go back to the old.

MRS. CLARA GOODMAN (Mrs. J. E. Goodman).

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a housewife and recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have known ever since I can remember and which I use nearly all the

time. When I purchase it I ask for shredded wheat and until recently have received the same as Plaintiff's Exhibit No. 1. Last week in Huber's grocery store at Altoona I was offered a package of whole wheat biscuit and the package before me is what I received when I asked for Shredded Wheat. I also had them give me a sales slip for this purchase.

(The sales slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 27.")

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 28.")

CROSS-EXAMINATION.

This purchase was made at the request of Mr. J. L. Black, the National Biscuit Company salesman at Altoona. I frequently buy at Huber's and have always gotten what I asked for including Shredded Wheat with this one exception. I was also asked to go to Fritz's and here I was given the Shredded Wheat that I asked for. The package of whole wheat biscuit that I bought I put in the car and turned over to Mr. Black who lives across the street. I do not know what became of the biscuits that were in the package. I had never heard of the Kellogg shredded wheat until this package was handed to me and did not know there were two kinds. I knew then there were two kinds of shredded wheat on the market. There is a difference between the two biscuits you show me, the Shredded Wheat biscuit is larger. When Mrs. Huber gave me this package of "Kellogg's" shredded wheat, I knew right away it was not a Niagara Falls package I was getting. I recognized instantly that it was not a new shredded wheat package.

The conversation I had with Mr. Savage had to do with the difference in the boxes and there was nothing said about the Niagara Falls biscuit being the only shredded wheat. The Kellogg biscuit does not look like the Shredded Wheat I have been buying, it is a smaller biscuit and very brown and I would describe it as a whole wheat biscuit, to call it a shredded wheat biscuit would be a misrepresentation. If this biscuit is made of wheat, shredded and put in biscuit form, I would still say that it is not Shredded Wheat for it is not made by the Niagara Falls people. It is whatever you people have marked it.

Defendant's Exhibit No. 5 for identification is not Shredded Whole Wheat biscuit because if an article is marked you usually ask for what it is marked, if that is what you mean but if I had the same biscuit in a carton, Defendant's Exhibit No. 5 for identification I would say that that is Whole Wheat Biscuit because that is what it is called. As to Exhibit No. 5 for identification, I have always bought Shredded Wheat biscuit and therefore I would say that is Whole Wheat Biscuit.

Referring now to Plaintiff's Exhibit No. 14, the articles in the plate on the end are Shredded Wheat Biscuit. They look different to me from the other package on account of the size and the picture. One I would call Shredded Wheat and the other Whole Wheat Biscuit. This is just my own idea, just sitting here talking to you not talking to anybody about it. If you get all of the cartons out of sight and just put two biscuit down on the table, one would be Shredded Wheat and one would be Whole Wheat. I have known that only since last week because I have not known your product until last week.

RE-DIRECT EXAMINATION.

Q. What would you think, if Kellogg's or any other manufacturer, other than the National Biscuit

Company, put a biscuit on the market like that, this whole wheat biscuit, and called it shredded wheat? What would you think?

A. Well, I think it would be misrepresenting the company that it is made by.

RE-CROSS-EXAMINATION.

Ten years ago I worked as a saleslady handling clothing and such things but I have never been a demonstrator nor done any work in the grocery line.

JOE H. MILLER.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a salesman, 36 years old, unemployed at present. Plaintiff's Exhibit No. 1 is a Shredded Wheat carton, the biscuit taken therefrom is a Shredded Wheat Biscuit which I remember as far back as I can. I have been eating Shredded Wheat since childhood and occasionally purchase it in a grocery store where I ask for a box of shredded wheat. I have received Shredded Wheat and have also received Kellogg's Whole Wheat Biscuit, the latter several times and once very recently, the last time being Thursday when I made a purchase of a bottle of milk, a loaf of bread and a box of Shredded Wheat. I received the first two and a box of Kellogg's Whole Wheat Biscuit. I asked for Shredded Wheat, was given the Kellogg package which I accepted and paid for and received a sales slip for. The store was Witherow where I had made purchases

before and had always heretofore received Niagara Falls Shredded Wheat. I made this purchase at the request of the National Biscuit Company representative. I was asked to go to one other store but did not do so.

(The sales slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 29.")

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 30.")

CROSS-EXAMINATION.

Mr. Black of Altoona asked me to make this purchase. I have known him about 14 or 15 years. He said that I should ask for Shredded Wheat and see what I was given and that later I was to come here and testify. Mr. Black asked that I go to the Witherow store and one or two others but as I got the evidence he wanted in the first store I did not go to the others. I believe the other store I was to go to was L. K. Black, which is a Handy Service Store by which I mean they form themselves into a buying organization.

When employed I was a salesman for the General Outdoor Advertising Company. I have never worked in the grocery line. The first time I heard of Kellogg's Shredded Wheat Biscuit was six or seven months ago when there was a package at my home which my mother said the store had sent. We used up that package but have had no more since.

At the time I made the purchase the package was set on the counter together with the other items I purchased—I recognized it as a Kellogg package later but did not open it. I saw the biscuit in the package my mother had but could see no difference between that Biscuit and the Niagara Falls biscuit. The biscuit taken from Plaintiff's Exhibit No. 1, is a Shredded

Wheat biscuit which I recognize from seeing it and knowing the shape and design.

I have known Puffed Wheat and know that wheat is put up in various forms such as shreds and puffed and flakes, also bran, and made into flour and the flour into wheat bread.

From looking at the biscuit I could not tell where it was made but I would call it a shredded wheat biscuit. One is shorter than the other but they both look like shredded wheat, one made at Niagara Falls, the other at the Kellogg plant.

Q. You want to change your testimony now and say that this Kellogg product which I show you, taken out of Defendant's Exhibit No. 6 for identification, is not a shredded wheat biscuit?

A. Oh, no, that looks like a shredded wheat biscuit.

Q. To you?

A. Yes.

Q. Did you say you had been a salesman at one time?

A. A salesman, yes.

MR. CLARKE: That is all.

RE-DIRECT EXAMINATION.

By MR. SAVAGE:

Q. Just one more question: Will you state what impression it would make on you or what your opinion would be if a biscuit, such as is contained in Defendant's Exhibit No. 6 for identification, were sold or offered for sale in the stores as shredded wheat biscuit, instead of whole wheat biscuit?

A. I think it would be very unfair competition.

E. N. THOMPSON.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am in the food market business which deals in meats, green goods, poultry and bakery. We are right in the residential district, our P. O. being Homewood station. We have eighteen employees, run four delivery trucks and have six telephone lines. Our store is what we call a complete service store where people can call up and receive just what they want. I have always been in the grocery business and in this particular business for about fourteen years.

I certainly do recognize Plaintiff's Exhibit No. 1 as a package of Shredded Wheat and the contents as Shredded Wheat biscuit. I have been familiar with this biscuit for the past twenty years or more in which time I do not think the biscuit has changed any in form or appearance. The general public designates this particular package as Shredded Wheat and when they call up and ask for Shredded Wheat we give them the same as Plaintiff's Exhibit No. 1 and nothing else. I have never known any other shredded wheat. The expression Shredded Wheat has a very good reputation attached to it in the mind of the public and is a nationally known product and when people ask for Shredded Wheat there is but one product that they want.

CROSS-EXAMINATION.

I am carrying Kellogg's Shredded Wheat at the present time and when a customer asks for Kellogg's Shredded Wheat that is what I give them. The Kellogg's biscuit was put in during my absence and a one-cent sale run. There is not enough difference in the two products to justify a grocer in carrying both—one is a good seller, the other is not.

I believe in competition in trade and that no one should have a monopoly on any certain thing but where two articles are so similar it does not warrant a grocer in stocking them. There is a difference in the size of the biscuit but other than that there is little difference. We still have some Kellogg's biscuits on hand which we are trying to dispose of. I realize Kellogg's are large advertisers but I have not seen any of their advertisements of shredded wheat, nothing but the package itself. Both of these products are shredded wheat, there is a difference in size, otherwise they are the same with the exception that one is made in Niagara Falls, the other in Battle Creek, Michigan.

I handle Post Toasties as well as Kellogg's Corn Flakes. When a customer asks for corn flakes we ask her whether she wants Kellogg's or Post Toasties. I have never heard of anyone asking for Post's Corn Flakes but if they did I should give them Post Toasties. I have never heard of Quaker Corn Flakes but of Quaker Crackles.

JAMES LEE BLACK.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a special salesman for the National Biscuit Company. At my request Mrs. Goodman, Mrs. Colliflower and Mr. Miller made purchases of shredded wheat in certain stores in Altoona. After their purchases they delivered them to me and they are now Plaintiff's Exhibits 25 to 30, all of which I can identify.

Exhibit No. 25 is the sales slip from Black's store; I marked this slip with the grocer's and the purchaser's names on the back with blue pencil.

Exhibit No. 26 I can identify by the writing of "Black's grocery" in the red pencil. This sales slip and carton were delivered to me by Mrs. Colliflower after she had made her purchase at Black's store. I put same in my car and later took them to the office where I removed the contents and folded the carton and mailed same to Mr. Thoms of the National Biscuit Company at East Liberty.

Exhibit No. 27 is a sales slip issued by Mrs. Huber on the back of which I have marked in blue pencil the date, the name of the purchaser and the store and Exhibit No. 28 is the carton which was received.

Exhibit No. 29 is a sales slip issued by the Witherow Grocery in Altoona and the purchaser J. H. Miller and this sales slip and package were turned over to me by Mr. Miller.

Exhibit No. 30 is marked 13¢ on the outside of the box and the sales slip calls for 12¢. Mr. Miller brought me the sales slip and the package direct from the store. Exhibits 27 and 28 are the identical slip and package I received from Mrs. Goodman and Exhibits 25 and 26 are those received from Mrs. Colliflower.

CROSS-EXAMINATION.

I have been in the grocery specialty business about 13 years.

It was not necessary to put any heading in Plaintiffs' Exhibit No. 27 as it was already in there. Exhibit No. 29 had no heading on it so I marked in the name of the store, the street number and Altoona, Pennsylvania, just as a reminder. I was outside of the stores in each instance when the purchases were made and immediately after they were made they were turned over to me. Sometimes I was in my car, sometimes standing on the street corner. I added the name "Witherow" out on the street, the address I added

after I had gotten back in my car. The reason for these notations was for identification purposes by me to show where the purchase was made. I did not think it necessary to have that information supplied by the seller.

I had asked Mr. Miller to go to two stores but after his purchase at the Witherow store I told him it would not be necessary to go to the other. One of the other women went to two stores in one of them she got the shredded wheat she had asked for and I still have that package, not deeming it necessary to say anything about that. In the other instance the lady got Kellogg's Whole Wheat Biscuit instead of Shredded Wheat. I do not know whether it is shredded wheat or not because the outside of the carton calls for Kellogg's Whole Wheat Biscuit. If the Kellogg's biscuit were served to me in a bowl and not having tasted it I would say that it looked like shredded wheat. I have never tasted them and do not know whether there is any difference in the taste from Shredded Wheat. If a customer asked me whether the Kellogg product was a shredded wheat I would say it was a substitute.

I do not know just how Shredded Wheat is made but know that it is one of the biggest selling breakfast foods that there is. I know that it is made of wheat as the carton calls it Shredded Wheat and according to the laws of Pennsylvania things have to be what they are advertised.

I have been to Niagara Falls but never to the Shredded Wheat plant; the time I was there was July 4th when the plant was closed. My contact with Shredded Wheat has been only since the National Biscuit Company has taken it over. I know nothing about the biscuit being shredded, I only know what it is advertised as. In my contact with the stores I tell the merchants that Kellogg's product is a substitute for

that made at Niagara Falls. I ask them if they have been successful in selling Shredded Wheat and in nine times out of ten they say "yes" and then I ask them why they substituted. There are various reasons given for this question. I never talk about Kellogg products, if possible, and if a grocer asked whether there was any difference between the Shredded Wheat made by National and that of the Kellogg product I would tell him that was for him to decide.

On two occasions in the past I was served with Kellogg's individual package in two different restaurants and these were my first introduction to the Kellogg Whole Wheat Biscuit. Had they been served outside the carton I would have noticed a difference in the taste and would have realized that they were not Shredded Wheat. I also recognized the difference in size and after they were served to me I merely ate some of the milk and then pushed the biscuit aside, being loyal to National Biscuit Company products, and that was my first experience and introduction to Kellogg's Whole Wheat Biscuits.

RE-DIRECT EXAMINATION.

The first of these substitutions occurred in the Palace Restaurant in Johnstown and I think the other was at the Washington restaurant in Greensburg, Pennsylvania. The Greensburg incident happened three or four weeks ago and the Johnstown incident a week or two prior to that.

I realize that products are saleable in Pennsylvania under trade names and trade-marks and that those sold as Kellogg's Whole Wheat Biscuit or Kellogg's corn flakes need not necessarily be made by Mr. Kellogg.

In my opinion the name "shredded" means something pulled apart such as shredded wheat or shredded

cocoanut, but Shredded Wheat to me means a biscuit that I have known since childhood.

RE-CROSS-EXAMINATION.

In my second experience with the individual carton of Kellogg's biscuit I did exactly the same as in the first, I ate a little of the milk off and pushed it aside. I fully realized I was getting Kellogg's product as in each instance the biscuits were served to me in the individual carton. I realize that Kellogg's product is being sold in competition and being sold as a shredded wheat. It makes a good substitution and is being handed out to consumers for Shredded Wheat on requests for Shredded Wheat.

My favorite brand of Corn Flakes is Kellogg's, occasionally I eat another brand. If I asked for Kellogg's and was given another brand I would say it was a substitution. Since childhood Shredded Wheat has always meant the Niagara Falls product to me and Corn Flakes has always meant Kellogg's.

FRANK J. PIALET.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

For the past twenty years I have been a retail grocer in the suburbs of Pittsburgh. We carry a full line of groceries and employ three clerks. Our store is what is called a service grocery store, telephone orders, deliveries and credit. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and the contents as Shredded Wheat Biscuit which I have been familiar with for the past twenty years as a grocer and previously as a consumer about ten years. The Shredded Wheat Biscuit

in form, shape and appearance remains the same as I have always seen it. The term "shredded wheat" conveys to me a biscuit made of wheat in shredded form and manufactured at Niagara Falls and regarded by me as the only Shredded Wheat Biscuit. When our customers ask for Shredded Wheat we give them the original Shredded Wheat same as Plaintiff's Exhibit No. 1. Plaintiff's Exhibit No. 10 with the dish on the end of the package I recall being used up to three or four years ago, the length of time it was in use I should say was about twenty-five years.

About two weeks ago I went to the Grayboro for breakfast and called for Shredded Wheat biscuit. The young lady picked up an individual package of Kellogg's Whole Wheat Biscuit—I told her that was not Shredded Wheat and she said it was just the same. I finally took it because she had opened the package, but it was not the same as Shredded Wheat to me.

CROSS-EXAMINATION.

This was a biscuit made of shreds of wheat and baked, although the package did not read that way, but what I wanted was the old familiar Shredded Wheat made at Niagara Falls. I knew immediately that it was a different biscuit as it was not as crisp nor did it have the toasted flavor of Shredded Wheat. I did eat one of the biscuits but did not like them. I cannot say about this dislike being general, but I will say that Kellogg is practicing on someone else's trade-mark and selling under someone else's advertising. The package, to my way of thinking, misrepresents the contents. To my taste the Kellogg biscuit is not as crisp or as well toasted as the National Shredded Wheat, but other opinions may not be the same.

If I were asked for Kellogg's Corn Flakes I would not give a customer Post Toasties and tell them they

were the same. The girl evidently had no Shredded Wheat and gave me the nearest thing to it, but to my taste it was not Shredded Wheat. She said it was the same as the other shredded wheat biscuit, of course I had the carton before me and knew it was not the same as it was marked "Whole Wheat Biscuit" and the size and the taste were not the same.

I have been in the grocery business about twenty years but in the retail grocery for myself only about five months.

I came here to testify because I was asked whether I had ever asked for Shredded Wheat and had been given whole wheat biscuit. I did not know the gentleman who had asked me, but I told him that I had and where it was. This was several weeks ago and then another gentleman whose name I do not know asked me to testify here—I have three people running my store, so I was able to get away. If anyone asked for Shredded Wheat I would give them the Niagara Falls product; if they asked for Kellogg's Whole Wheat Biscuit I would give them that; if they asked for Kellogg's shredded wheat I would give them the Whole Wheat Biscuit.

RE-DIRECT EXAMINATION.

—If I had a product on which I had spent millions of dollars and years of time to put it on the market I would consider it decidedly unfair if someone else came along and put out the same kind of an article. I know that the Shredded Wheat Company has done extensive advertising over a great period of years.

RE-CROSS-EXAMINATION.

We carry every product that Kellogg makes except their Whole Wheat Biscuit, for which there is no demand. If a customer asked for it I would tell her

we did not keep it as the turnover was so slow we could not keep it fresh. We tried it out but the customers wanted the old shredded wheat biscuit.

I handle Kellogg's Corn Flakes and their Rice Crispies, but I do not handle Post's Corn Flakes because my trade prefers Kellogg's. If a customer just asks for Corn Flakes I give her Kellogg's; none other come up to it. I certainly believe in the competitive system, but it does not seem fair for another concern to put something similar on the market and gain the advantage of the enormous amounts of money that have been spent in advertising. Wherever you would see Shredded Wheat you would see a picture of the Niagara Falls cataract, that being the home of Shredded Wheat.

WILLIAM H. McSHANE.

Deposition taken in Pittsburgh, Pennsylvania,
December, 1932.

DIRECT EXAMINATION.

I have been a retail grocer for the past eighteen years carrying a full line of groceries in the same town, eleven years for others and seven years for myself. Our store is both a service and cash and carry.

Plaintiff's Exhibit No. 1 is Shredded Wheat, the contents of which have looked the same ever since I have sold it, for the past eighteen years. If a customer asked for Shredded Wheat I would give her the package similar to Plaintiff's Exhibit No. 1. Shredded Wheat to me means a biscuit made at Niagara Falls and none other. To my customers it means a breakfast food and as they have always been accustomed to getting this particular biscuit, that is what I give them when they ask for Shredded Wheat. I carry the Kellogg Whole Wheat Biscuit. Some years ago there was

a similar biscuit on the market—I believe it was called Ross, but it did not sell.

CROSS-EXAMINATION.

I carry both products at the present time and recognize that they are both physically the same type of product and look alike except that the shredded wheat biscuit is larger. I have eaten the Kellogg product and have enjoyed it and in my mind there has never been any confusion between the two products.

I handle Kellogg's Corn Flakes and Jersey Corn Flakes as well as Post Toasties and give the customers whichever they ask for. The three are different makes of the same general type with the Post Toasties a little thicker than the Kellogg's Corn Flakes.

MARGARET TRESCHER.

Deposition taken in Pittsburgh, Pennsylvania,
December, 1932.

DIRECT EXAMINATION.

I am a housewife, married, living in Pittsburgh. Plaintiff's Exhibit No. 1 is a package of Shredded Wheat, the contents of which I have been familiar with for the past fifteen years. I associate the name of Shredded Wheat with Niagara Falls, that being the picture on all their packages. When I order Shredded Wheat that is what I usually get, but recently I went into Isaly's Dairy and asked for Shredded Wheat and was handed this package. They had just a small package and they gave me that. I have identified the package with my initials. No, I did not eat them on the premises. I was going to eat them on the premises, and it was rather late, so I asked the waitress to put them in a bag for me. She asked me if I wanted more

as long as I was taking them away. This is the bag they put them in and I just looked at the package, because really I had never seen them.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 31.")

CROSS-EXAMINATION.

After I initialed the carton I gave it to Mr. Crilly, whom I have known for a great many years and who works for the National Biscuit Company. He asked me if I had ever been given any other product when asking for Shredded Wheat. At the time I did not know there was another product. The next time I went to Isaly's, where I eat occasionally, I asked for Shredded Wheat and was given the Kellogg product. I knew right away it was a different shredded wheat that I was getting. I noticed right away that this was a Kellogg package they had handed me. I took it home and ate it, because the place was crowded at the time. Mr. Crilly asked me if I would go to Isaly's sometime and see what product they served, but he suggested no other places for me to go to. I had never known before that there was a similar biscuit on the market, but I realize now that there are although they taste somewhat different, one biscuit is harder and has less taste to it and it is toasted more. By that I would assume that it was a biscuit made out of wheat in shredded form.

RE-DIRECT EXAMINATION.

Up to the time I received the two Kellogg Whole Wheat Biscuit I had never had anything else that was like a shredded wheat biscuit. Defendant's Exhibit No. 6 looks like Shredded Wheat; if I saw that dish dissociated from the other printing matter I would think it was shredded wheat.

GEORGE JOHN BORNEMAN.

Deposition taken in Pittsburgh, Pennsylvania,
December, 1932.

DIRECT EXAMINATION.

I am in the trucking business for the Pittsburgh Wholesale Delicatessen and am familiar with Shredded Wheat for the length of time that I have sold it, about twenty-four years. The package before me marked "Plaintiff's Exhibit No. 1" is Shredded Wheat, the general appearance of the package and biscuit have not changed any during the time I have known it.

Recently I was in a restaurant with Mr. Crilly and he asked me to have something to eat. I had had my dinner so just ordered some shredded wheat and was handed a package of Kellogg's Whole Wheat Biscuit. I asked at the time if that was Shredded Wheat and was told that it was the same thing. I ate the biscuits and have with me here the carton.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 32.")

CROSS-EXAMINATION.

Mr. Crilly, who is one of the National Biscuit men, came in the restaurant while I was there and joined me—he asked me to have something to eat—I had already eaten, but as I can always eat at any time I just ordered some Shredded Wheat. I immediately recognized a difference in the biscuit, first in the package and then in the size and taste of the biscuit. I was familiar with the fact that Kellogg's made a shredded wheat biscuit, having handled it when I was with the independent stores. While with the A. & P. stores I was familiar with Kellogg's Corn Flakes as well as two other brands which they carried, the Jersey and

a brand of their own called Sun filled corn flakes made by the Quaker people and sold in their stores exclusively. The A. & P. have from fourteen to sixteen thousand stores. I waited on the counter there and when anyone just came in and asked for corn flakes I would give them Sun filled corn flakes. Of course, if they asked for Kellogg's or Jersey we would give them the brand they asked for if we had it in stock.

I came here to testify at the request of Mr. Crilly inasmuch as I had had this experience while with him—I came of my own free will and do not expect to be paid.

RE-DIRECT EXAMINATION.

While with the A. & P. stores, when a customer asked for Shredded Wheat we gave her the package same as Plaintiff's Exhibit No. 1.

RE-CROSS-EXAMINATION.

It is six months since I left the A. & P. At that time they did not carry Kellogg's Whole Wheat Biscuit and I do not know what their policy would be now if they carried both products. I have never heard of shredded cocoanut or shredded codfish:

JOHN A. ORR.

Deposition taken in Pittsburgh, Pennsylvania, December, 1932.

DIRECT EXAMINATION.

I am a retail grocer in Turtle Creek, a residential suburb of Pittsburgh. I have four stores, all in Turtle Creek. I am familiar with Plaintiff's Exhibit No. 1, having sold it about thirty years, first in Toronto, Canada, for the T. Eaton Company, and for the past twenty-eight years in the United States. I have been in business for myself since 1921. I recognize the

contents of package as Shredded Wheat, which has remained the same size and shape during the years that I have been familiar with it.

Shredded Wheat to me means a national product which we are selling to the public every day and it means but one article. The purchasing public come in and ask for it and we give them Shredded Wheat, which is what they want. It has a positively established reputation and a lot of good will attached to it. Shredded Wheat has been so extensively advertised that it practically sells itself. Three or four years ago I carried Kellogg's Shredded Wheat, but it could not compete with Shredded Wheat Biscuit—there would be no repeat orders and we finally had to send some back.

I do recall when the Kellogg people changed the name of their biscuit to Whole Wheat, but I do not know the reason for it and I have carried none of the biscuit since the name has been changed. At the present time I have one of their packages with the glassine window in. Kellogg's salesman was in my store the other day and gave it to me and told me if I told the people it was like shredded wheat we would sell it. Looking through the glassine window the biscuit does look like shredded wheat, but there is a difference in the taste. I have tasted them and the Kellogg's biscuit, when it becomes moist, is tough, whereas Shredded Wheat remains crispish.

I do think the glassine window in the package will affect the sale of Whole Wheat Biscuit, as people will see that the biscuit looks like Shredded Wheat and will buy it on the strength of Shredded Wheat quality.

CROSS-EXAMINATION.

I believe in competitive sources of manufacture of different products and have no fight with the Kellogg

people; we try all of their products but their shredded wheat will not sell in our store and I have no room for goods that are not movers.

The goods in Defendant's Exhibit No. 6 is an imitation Shredded Wheat, there being a difference in the size, the Niagara Falls product being about an inch longer. I handle Kellogg's Corn Flakes, in fact five brands of their cereals. I also handle the Jersey corn flakes which are in a sense an imitation of the Kellogg Corn Flake except for the difference in the quality, the Kellogg's Corn Flakes being superior in my mind and in the minds of most people.

I do not think a grocer should fraudulently sell the Kellogg product for the Niagara Falls products—they are both shredded wheat biscuits and of course the Kellogg product is as good as they know how to make it. The Kellogg package is advertised as Whole Wheat biscuit and if a customer comes into my store and asks for a package of Shredded Wheat and if I give her the Whole Wheat Biscuit she would say "that is not what I want". Then I would have to tell the lady "it is the very same as Shredded Wheat but put up differently" as she would not know by the name Whole Wheat that it was shredded wheat. It is made of wheat, on the same order as Shredded Wheat but there is a difference in the make-up. Some of the customers will repeat but many will not. I know I did not get rid of mine. No, I would not be surprised to be told that Kellogg's had a very large business on Whole Wheat Biscuit and I agree that if it were not for the plate with the two biscuit on it no one would know what was in the package as it could be any one of six or eight different things and still be called Whole Wheat Biscuit. I could not sell this article as a Whole Wheat Biscuit and it was necessary to tell people that it was a biscuit made by Kellogg's. This was not un-

fair on our part as it was our only avenue to dispose of the goods and had customers come back and asked for more of it I would have been perfectly satisfied.

RE-DIRECT EXAMINATION.

Q. Now let us get down to brass tacks. Is it fair or unfair for the Kellogg Company to get out an imitation, as you call it, of shredded wheat biscuit?

A. No, it is not fair to the people who put out Shredded Wheat. It is not fair to them, to come in and put out this other product, because they cannot sell this without telling them it is Shredded Wheat and telling them it is identically the same as Shredded Wheat.

When I had the package with the window in it all I had to do is to put it on the counter and let them see for themselves.

RE-CROSS-EXAMINATION.

If I were trying to sell a corn flake put out under a different name and also carried Kellogg's Corn Flakes and a customer came to buy corn flakes I would have to tell her that the contents of the first package was an imitation of Kellogg's Corn Flakes in order to sell it and in order that she may know what is in the package. If Kellogg was the only concern allowed to use the word "Corn Flakes" and others were making a similar cereal put out under a different name I would have to explain to them that it was like Kellogg's Corn Flakes.

There were other articles sold blind like that necessitating explanations, one being a Whole Wheat product put out by the Jersey Corn Flakes people which looked like Rolled Oats but was a Rolled Wheat and it was necessary to mention each time you sold a package that it was like Rolled Oats.

In the case of the Jersey Corn Flakes the name is on the outside of the package and the customer

knows exactly what it is. The sale of Kellogg's Whole Wheat Biscuit was handicapped by the necessity of having to tell customers what was in the package. Had the package been marketed as Kellogg's Shredded Wheat it would have explained itself. If the dish were removed from the face of the package and reference to shredded wheat removed the package would have to be opened to find out what it contained. It requires a real salesman to put across the sale of a blind package.

Yes, I recall when Kellogg's Corn Flakes were known as toasted corn flakes and so many brands of corn flakes came on the market that Kellogg had to call theirs Kellogg's Toasted Corn Flakes.

I understand that both of these companies are friendly to us and I am not fighting one more than the other. They are all my friends.

ORVILLE KEEDER.

Deposition taken in Pittsburgh, Pennsylvania,
December, 1932.

DIRECT EXAMINATION.

Empire, Ohio, is a town of about 700 about twelve miles up the river from Steubenville.

Recently at Isaly's in Steubenville, a confectionery store which sells milk and butter and puts up lunches, I asked for shredded wheat and was handed this box of Kellogg's Whole Wheat. I said "Now, this is Shredded Wheat, is it?" and she said "Yes, sir." I knew that it was not from the box but I ate it and brought the box away. The piece of paper attached to the box was signed by me and attached to the box by Mr. Herron about an hour after I received it.

(The box referred to was received in evidence and was marked "Plaintiff's Exhibit No. 33.")

CROSS-EXAMINATION.

Isaly's Restaurant is in Steubenville. I had never been in there before but went this time at the request of Mr. Herron who came in after me. Charles Stewart, a young man who works in the National Biscuit Company offices in Steubenville introduced me to Mr. Herron and I was then asked to go to this restaurant and to buy shredded wheat. I ate one of the Kellogg biscuits and did not like it. I do not care for shredded wheat so it made no difference to my personal taste which package I received.

THEODORE KEENAN.

Deposition taken in Pittsburgh, Pennsylvania
December 1932.

DIRECT EXAMINATION.

I am familiar with Shredded Wheat and recently I went to Kresge's five-and-ten-cent store in Steubenville and asked for shredded wheat. I was handed the biscuits and the girl threw the package under the counter. Later another girl came along and I asked her to give me the package which was thrown under the counter. I have that box with me here gotten at the request of Mr. Herron of the National Biscuit Company. The paper attached to it was signed by me and attached by Mr. Herron in my presence.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 34.")

I had never seen the Kellogg small package but had seen the Niagara Falls package and knew instantly that I was not getting the Niagara Falls product when the girl at Kresge's handed me the package.

MR. CLARKE: I am willing to stipulate that each of the following witnesses: F. H. Fitzgerald, 7301 Kelly Street, Homewood; P. E. Gibson, 5847 Ellsworth Avenue, East Liberty; George E. Straw, 1111 Maple Avenue, Turtle Creek; Frederick Gross, 317 Atlanta Avenue, McKeesport; O. Dornbush, Adams Street, Steubenville, Ohio, if called would testify that he is a retail grocer in or about Pittsburgh, that he handles the Shredded Wheat of the National Biscuit Company, formerly made by The Shredded Wheat Company; that he has known it for several years, and that, when customers ask for shredded wheat, the order is always filled with the product of the plaintiff.

And it is further stipulated that said witnesses also would testify that customers who ask for corn flakes mean Kellogg's Corn Flakes, in practically every instance, and that where a customer asks for corn flakes the grocer gives them Kellogg's.

WILLIAM FRANKLIN NUBERMAYER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I have been in the grocery business about twenty-five years carrying a full line of groceries, including cereals. My business is in the residential suburb of Cleveland and we do a credit service delivery business, receiving a great many orders over the telephone.

I recognize Plaintiff's Exhibit No. 1 as a package of Shredded Wheat and the contents of the package as shredded wheat biscuit. I have been familiar with shredded wheat for the past twenty-five years and have always carried that item. During this time I have

noticed no perceptible change in its appearance. The term "shredded wheat" conveys the fact that it is shredded at some time or other and is made by The Shredded Wheat Company of Niagara Falls, and is a breakfast food.

When a customer either in the store or over the telephone asks for shredded wheat we give her the same as Plaintiff's Exhibit No. 1 which we have always known. Plaintiff's Exhibit No. 10, particularly the end of the carton was changed about a year and a half ago. I remember seeing that dish as long as I can remember shredded wheat. The strip of paper, I have seen in store windows within the last year.

(The strip display sign referred to was received in evidence and was marked "Plaintiff's Exhibit No. 35.")

MR. VILAS: I have a glass bowl here, with biscuit in it, which I would like to have marked for identification.

MR. CLARKE: You may have it marked in evidence now, if you wish.

MR. VILAS: Very well. I offer it.

(The glass bowl referred to was received in evidence and was marked "Plaintiff's Exhibit No. 36.")

The glass bowl, Plaintiff's Exhibit No. 36 I have seen some ten or twelve years ago in restaurants, cafeterias, etc., usually filled with shredded wheat biscuit.

A. It seems as if every restaurant had them—that is, the cheaper type of restaurant, cafeteria, and the little restaurant, on the outskirts, as I remember it.

CROSS-EXAMINATION.

I know of Kellogg's Shredded Wheat which we handle and which we introduced in the store about three years ago.

HARRY EDWIN PENDER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I am in the retail grocery business for the past twenty-two years working for the Southworth Company in capacities from driver to superintendent and at the present time store manager. We are members of a voluntary chain of which there are between one hundred and fifty and two hundred stores. In the store which I manage we carry a complete line of groceries and meats. Our store is a service store in the downtown section run chiefly on a cash basis to accommodate the people working in the downtown section and who wish to pick up things to take home with them. The orders taken downtown are transferred to outlying stores for delivery service.

Plaintiff's Exhibit No. 1 which you have in your hand is Shredded Wheat and the contents are Shredded Wheat which I have known for about twenty-two years and which has remained the same in appearance. The package in which the biscuits were packed has also remained practically the same during all those years. Plaintiff's Exhibit No. 10 with the dish on the end of it I can remember up until recently, the dish on one end and the Falls on the other, I should say this was on for approximately twelve or fifteen years.

If a customer asked for shredded wheat I would give her the Niagara Falls Shredded Wheat and I would say that it is the package they would expect to receive. Shredded Wheat has a reputation or goodwill attached to it and they have advertised very extensively. We have had their advertising in the store at different times.

I do not recognize the strip, Plaintiff's Exhibit No. 35 but I do recognize the glass bowl, I have not seen.

that for perhaps fifteen years, when I did it was always in front of you in a restaurant.

We handle a full line of Kellogg's products including Kellogg's Whole Wheat Biscuit in packages like Defendant's Exhibit No. 6.

CROSS-EXAMINATION.

If a customer asked for Kellogg's Shredded Wheat I would ask them if they meant Kellogg's Whole Wheat Biscuit or Shredded Wheat.

There is a family resemblance between the whole wheat package and the Kellogg family of packages as to color, set-up, etc. About three years ago we handled the package known as Kellogg's Shredded Whole Wheat Biscuit the same as Defendant's Exhibit No. 5. The first time that package was shown to me it would throw my idea to the package of Shredded Wheat without seeing the contents but if I were shown a package of Kellogg's Whole Wheat biscuit without any illustration on it I would not know what was in the package and would have to open it up the first time. If the package contained a picture of shredded wheat on it it would then revert back to the other Shredded Wheat.

I have associated "Niagara Falls" with Shredded Wheat ever since the package came into existence. I used to do a good deal of window trimming and in pyramiding them up we always tried to alternate the ends.

RE-DIRECT EXAMINATION.

If I saw a package like Defendant's Exhibit No. 6 so blanketed that I just saw the picture of the dish with the biscuit in it I would think of the original Shredded Wheat made at Niagara Falls.

RE-CROSS-EXAMINATION.

I would be very much surprised now to find that there was any grocery man in the grocery business who did not know that there were two brands of shredded wheat on the market, one Niagara Falls and the other Kellogg's.

JACOB J. COHEN.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

For approximately eleven years I have been in the general grocery business carrying a full line including cereals. Plaintiff's Exhibit No. 1 is Shredded Wheat which I have handled since I have been in the game. The biscuit has been substantially in the same form and appearance since I have known it.

The term "shredded wheat" to me means only the one biscuit which was the only one I knew of up until a few years ago when muffets came on the market which I handled too, at one time.

When a customer asks for shredded wheat I give her the package same as Plaintiff's Exhibit No. 1 as that is the only kind I handle. I handled Kellogg's Whole Wheat Biscuit at one time packed in the type package as Defendant's Exhibit No. 5. I got this lot from the wholesaler who said that I could sell the consumer telling him it was shredded wheat, that there were more biscuit in the package and it was a little lower priced than the National Biscuit product at that time. The sale of it did not increase as I hoped it would, the customers preferring the original Shredded Wheat and I was forced to wish it on a lot of customers by sending them Kellogg's when they phoned their

orders, unless they complained, which some of them did and then I had to give them the original Shredded Wheat.

Last Saturday in the Sunnybright Restaurant I asked for shredded wheat for breakfast and was given a little box. I said, "Have you got them," and he said, "No, this is shredded wheat, ain't it?" I accepted it and examined the box which said Whole Wheat Biscuit on one side and Shredded Whole Wheat on the other.

CROSS-EXAMINATION.

We have had both packages in the home and I really do not see a lot of difference in the taste. They both look alike and taste alike practically. They are both made of wheat and put into biscuit form. From the name I have assumed that they were made of wheat cut into little shreds and as far as I am concerned, the description fits the Kellogg Biscuit as well as the Niagara Falls biscuit.

The fact that the chain stores did not carry Kellogg's made an impression on me. The jobber who sold it to me, an old Clover Farm Company man said "here is a good chance to get back at the National Biscuit Company, there are more biscuits in the package and the price is lower too." At first I thought it would go across pretty good but it did not seem to so I had to use the argument that it had more in it and that it was a shredded biscuit biscuit. The Kellogg name was prominent on the package.

The National Biscuit Company changed their policy on the discount proposition in the cracker department in the past year or so but that change was not due to the competition of the Kellogg Company. They never tried to encourage the sale of their crackers through their shredded wheat line. About a year ago they started selling the grocer shredded wheat direct;

previously it was purchased through jobbers and the price was the same and their price was the same. About six months ago they started giving the same discount to everybody alike, before that independent grocers felt that the chain stores were getting a better discount in the cookie department.

I handle the full line of Kellogg's products with the exception of shredded wheat and that did not go across with me. I handle Kellogg's and Post's Corn Flakes. If a customer asks for Corn Flakes I give her Kellogg's unless she asks for Post Toasties.

RE-DIRECT EXAMINATION.

When talking about cracker discounts and chains, etc., I refer entirely to the sale by the National Biscuit Company of its regular line of crackers and cookies. This dispute has been going on right along, their contention being that the Federal Trade Commission had to give them permission to allow the sale. National Biscuit Company started selling Shredded Wheat about the first of the year and since then we have been getting a cracker discount on same of 17½%.

RE-CROSS-EXAMINATION.

The discount proposition came on this year—Kellogg's Shredded Wheat has been on the market two years or more and it is probably two years since I handled any of it as I did not have over two cases altogether. It did not move fast enough for me. I got rid of what I had although I regarded it as a slow moving product.

It would not surprise me to hear that they had quite a volume on the product now and if I thought it would move fast enough I would stock up with it again.

MARX ALTFELD.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I am a grocer having been in business in Cleveland for about thirty years. I handle groceries and delicatessen including cereals. Plaintiff's Exhibit No. 1 is the old Shredded Wheat biscuit. I have never handled anything but the Niagara Falls Shredded Wheat and this is what a customer gets when asking for shredded wheat.

I have known Shredded Wheat for over thirty years and some thirty or thirty-two years ago I went through their factory at Niagara Falls. When a customer asks for Shredded Wheat I know she wants the Niagara Falls biscuit as I have never handled any other.

I recall Plaintiff's Exhibit No. 10 having had cartons like that in the store and remember seeing the building and the picture of the dish for a good many years. I also remember seeing the strip, Plaintiff's Exhibit No. 35 in stores but not recently. I do not remember ever seeing the biscuit displayed in a glass globe like Exhibit No. 36.

CROSS-EXAMINATION.

Yes, I have heard of Kellogg's Shredded Wheat but not for long. It has always been my thought to confine myself to as few lines as possible and that if I would confine myself to Shredded Wheat people would take that, if they did not want that I would let it go. That was my reason for not putting in Kellogg's Shredded Wheat. I have seen the Kellogg product and recognize it as the same kind of a biscuit but smaller. I do not remember ever seeing Defendant's Exhibit No.

6. When it first came out it was in a package much like Defendant's Exhibit No. 5.

CARL MILLER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I have been in the grocery and meat business for approximately twelve years, previous to that had experience in the grocery business since about 1916.

I recognize Plaintiff's Exhibit No. 1 which you have in your hand as shredded wheat and the contents of the package as shredded wheat biscuit which I remember as a little boy when mother had them and if I remember rightly they were the same then as now. I have known them continuously since then and their form, shape and appearance has remained practically the same. Shredded wheat means to me only one thing, the biscuit contained in the package you have in hand.

When a customer asks for shredded wheat I give her the package same as in your hand, Plaintiff's Exhibit No. 1, never anything else. Years ago I saw a package like Plaintiff's Exhibit No. 10, the picture of the biscuit in the dish on the end of the package has been on every box that I have ever seen that I can recall. It is not on Plaintiff's Exhibit No. 1 and I cannot definitely say for how many years I have been familiar with it.

The strip, Plaintiff's Exhibit No. 35, I believe I have had at the store, Mr. Graham, the National Biscuit Company salesman having put them up in the store about a month or two ago.

Defendant's Exhibit No. 6 with the name blocked out suggests a Shredded Wheat Biscuit. I have never

stocked any of Kellogg's Whole Wheat Biscuit and never knew that they made a biscuit called Whole Wheat. No one from Kellogg's ever called on me and I never had a call for the product, if I had had enough of them I might have stocked it but I really do not know whether I would have or not as the package to me looks like a little bit of a steal.

The picture of the shredded wheat in the dish for one thing suggests the steal. If they were put in a package similar to Defendant's Exhibit No. 5, without the picture, I believe that would be a little more fairly taken. To me there is only one Shredded Wheat, that one package. (Referring to Plaintiff's Exhibit 1.)

CROSS-EXAMINATION.

That is a hard question to answer whether there is any other name that would describe that biscuit, I do not know of any. From just the name Whole Wheat Biscuit I would not have a definite idea what the package contained. It might be any one of 6 or 8 different kind of biscuit and to find out definitely it would be necessary to open the package. The picture of two shredded wheat biscuit on the package would indicate that it was a biscuit made of wheat in shredded form. I handle no Kellogg products whatsoever, no Kellogg representative having ever called upon me.

WILLIAM PERRY FISHER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I am an interior director, thirty-six years old, not connected in any way with the National Biscuit Company and recognize Plaintiff's Exhibit No. 1 as the

National Biscuit Company Shredded Wheat which I have been familiar with about seven years, my younger sons eating most of the shredded wheat in our family. When I ask for a package of shredded wheat I expect to get the package with the picture of Niagara Falls on and I have never been handed anything else in a grocery store but had that experience in a restaurant at 8719 Huff Avenue, Cleveland, on Saturday, December tenth. I went in, asked for shredded wheat, toast and coffee. Immediately in front of me, at the back of the counter, I noticed small packages of Kellogg's Whole Wheat Biscuit—the man turned around, opened one of these packages, put it in a bowl and handed it to me. I looked the package over and noticed that it did not have the picture of Niagara Falls so I asked if it was shredded wheat and he said, "Yes, isn't that what you ordered?" He handed me the package which was marked Whole Wheat Biscuit and said it was the same thing, so I ate the biscuit and brought the package with me.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 37.")

CROSS-EXAMINATION.

I came to save this package this particular day because Mr. Owens, who is salesman for National Biscuit Company is a particular friend of mine and in discussing different products he told me that some stores and restaurants were serving Kellogg's Whole Wheat Biscuit for Shredded Wheat, so when I had this experience at Harvey's Restaurant where I dine whenever I am on Huff Street, I just brought the package out with me and gave it to him. When the biscuit was served in the bowl I had no doubt about it being a shredded wheat biscuit product, that is, a wheat shredded into shreds and put into biscuit form.

MRS. EMILY HERRON.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

My husband is a special salesman for the National Biscuit Company, traveling all over. I recognize Plaintiff's Exhibit No. 1 as being Niagara Falls Shredded Wheat which I have been familiar with for about fifteen or eighteen years, having used it in the home for a good many years as I have a youngster who uses it all the time. When I ask for a package of shredded wheat I expect to get the product made at Niagara Falls and which I have seen made.

About three weeks or a month ago I gave a telephone order to Hammer's, the store close to my home at One Hundred and Second Street and Madison, and among other items ordered Shredded Wheat. When the order was delivered I received Kellogg's Wheat Biscuit. The order arrived in my absence and I did not see the grocer that evening, in fact, I have not been there since. I served the biscuits to the youngster in the morning but she seemed to notice the difference in taste and refused to eat it.

I brought the box that the biscuits were in with me, the piece of cardboard attached with writing on must be the grocer's who took the order. This was in the box with the groceries when it was delivered. I could see the biscuits in the package through the glassine window. The writing in lead pencil on the package is "Sakot," the name of my sister and brother, with whom I live and who pay for all the things purchased.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 38-A," and the box referred to was received in evidence and was marked "Plaintiff's Exhibit No. 38-B.")

- CROSS-EXAMINATION.

The slip, which was received in evidence as Plaintiff's Exhibit No. 38-A, was with the groceries when I came home in the evening. I could see through the window in the package that this was not the Niagara Falls Shredded Wheat, there is a difference in the size, and when I ate it noticed a difference in taste and texture, one seems crispier and harder than the other.

I have not ordered any shredded wheat from this store since. I intended to go to the store but as there were a few heavy things I did not care to carry I telephoned it and my husband then asked me to include shredded wheat. This is the only time I have ever received Kellogg's Shredded Wheat. The biscuit in the package looked like shredded wheat and I would not know any other name for it but it is what I have always called the regular Shredded Wheat which I have been accustomed to using and which I expected to get. I could see through the glassine window that the Kellogg product looked like shredded wheat but there was a difference. Sometime during the summer I was at Niagara Falls and saw the process of making the Shredded Wheat biscuits, saw it made into shreds and cut off into biscuit form and then baked, this was since the National Biscuit Company took over the business.

MRS. ADELINE LANSDOWNE (Mrs. S. J.).

Deposition taken in Cleveland, Ohio; December, 1932.

DIRECT EXAMINATION.

I am not related to anyone connected with the National Biscuit Company but have some friends employed by them. I keep house in Cleveland. I recognize Plaintiff's Exhibit No. 1 as the National Shredded Wheat which I have been familiar with for quite a

number of years. I have had eight in the family and have bought and used an awful lot of it. When I ask a grocer for shredded wheat I expect to get the Niagara Falls Shredded Wheat, same as Plaintiff's Exhibit No. 1.

A couple of times I have had the experience of getting something else when I asked for shredded wheat, the first time was one day last week. We drive a lot and I make purchases wherever it is handy. On this day I stopped at a store on Hayden Avenue and asked for a few things on my list including Shredded Wheat. The grocer said "I do not have Shredded Wheat but I have Kellogg's—it is just the same." I looked at it and said, "This is not made at Niagara Falls," he said "No, but it is just the same," so I took it. I cannot tell the name of the store, as it was in a neighborhood that I just happened to go through. The package I have in my hand is one of the packages I received when asking for shredded wheat. There is a yellow slip attached to it and the slip is marked Norris Grocery, which is the name of the store. The store-keeper wrote what is on it in pencil and Mr. Rank, one of the salesmen, wrote my name and address at the bottom of it. The second instance of receiving Kellogg's Shredded Wheat was in a store on Lakeview Road. I asked for shredded wheat, the grocer looked up on the shelf and said "I have Kellogg's." I told him that was not what I wanted and he said "it is just the same," so I took it and had the grocer give me a sales slip. I then gave the package to Mr. Rank.

(The yellow slip referred to, from the Norris Grocery, was received in evidence and was marked "Plaintiff's Exhibit No. 39-A," and the carton with it was received in evidence and was marked "Plaintiff's Exhibit No. 39-B.")

(The white slip referred to, from the grocery on Lakeview Avenue, was received in evidence and

was marked "Plaintiff's Exhibit No. 40-A," and the box accompanying same was received in evidence and was marked "Plaintiff's Exhibit No. 40-B.")

CROSS-EXAMINATION.

I noticed that ~~the~~ biscuits looked like shredded wheat, but were smaller than the Niagara Falls product and they were harder. I have been to Niagara Falls but have never been through the factory. The two products look very much alike until you come to try them. My children ate the Kellogg biscuit once but said they were harder and did not taste the same and were not as good as the others.

Mr. Rank was not with me when I made these purchases and he did not suggest these stores; he just asked me if I ever did any buying to ask for some shredded wheat and as I said whenever I am out riding I stop at any store that is handy. These are the only two instances where the Kellogg product was given me—I kept one of these packages and gave Mr. Rank the other. He wrote my name and address on one package and the signature on the box I kept is mine, written by me.

JACOB F. SCHNEIDER.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I have not been in business for twelve years, before that I was a grocer in Cleveland, twenty-five years for myself, and about fifteen years for other people. I have been in the retail grocery business since I was fourteen years old, all that time in Cleveland and for twenty-five years had my own store in which we took orders over the telephone, delivered goods and carried credit accounts.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, which I have been familiar with since they came on the market back in the nineties. My first knowledge of it came during their first advertising campaign in Cleveland and later I was a delegate to a convention of grocers held at Niagara Falls shortly after their plant was built. They met in the plant and had a banquet later and Dr. Perky gave us a lecture on shredded wheat and we went all the way through the plant. When the shredded wheat came to the Cleveland market I stocked it and carried it all the years after that. When a customer asked for shredded wheat I gave her the Niagara Falls Shredded Wheat as that is what it always meant to me and what it meant to the purchasing public.

Shredded wheat had a reputation which was acquired through advertising and being in our food show. Like all new articles, it is hard to get people to use it at first, but the people that bought from me took to it readily although some people do not like it, they did not at that time and at that banquet they had turkey, ice cream and different kinds of food, and everything had shredded wheat mixed in with it that did not appeal to us grocers who were mostly Germans and we had quite a time over the straw and hay we were fed at the banquet. Some of the public thought it was straw and hay at first, while others took to it very readily.

To the best of my recollection they kept plugging away at the advertising all the time. The demand for it grew as at first I used to buy in just small amounts and then I bought it by the case and when a deal was on I took in the deal.

Plaintiff's Exhibit No. 10 is an old timer. I cannot say how many years they used that sort of a package, but I remember handling it. Within the last two or three years I have asked for shredded wheat and been

given something else, but I insisted on getting Shredded Wheat until within the last week or two I was in a store on West Twenty-ninth Street, where they just call him Bob; there I ordered a few other goods and asked for a package of shredded wheat and was handed Kellogg's package. I said, "This is not Shredded Wheat, Mistake" and he said, "yes it is. That is shredded wheat." I said nothing more to him and took the package and this is the box; the yellow slip attached to the box is a list of the items asked for and purchased. My son ate most of the contents of the carton.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 41-A"; and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 41-B.")

When Kellogg's Whole Wheat Biscuit first came out a long time ago I carried it but it did not sell, people were used to Shredded Wheat. To the best of my recollection that Kellogg package when I had it said "Kellogg's Shredded Wheat" on the front of it.

CROSS-EXAMINATION.

My son, who is connected with the National Biscuit Company, asked me to make this purchase at Bob's store and I asked the grocer to make out a slip for me on which he wrote "shredded wheat," and I said "this is not shredded wheat." In some stores it is customary to make out slips, in others it is not, but they will all give you slips if you ask for them. The Kellogg-product looked like shredded wheat biscuits only smaller, but whether they eat the same I do not know; as a matter of fact I do not like either one.

When Kellogg's Corn Flakes first came out in 1905 or 1906 I handled them; that was a big seller. I have a faint recollection of it just being called Toasted Corn Flakes at that time and after other corn flakes

began coming on the market it was called Kellogg's Toasted Corn Flakes to distinguish it. I also handled Post Toasties. If a customer asked for Post Corn Flakes she would be given a package of Post Toasties. If she asked for Kellogg's Corn Flakes that is what she would get and if she just asked for corn flakes I would ask which kind did she want, as I carried two.

If I were in business today and carried Niagara Falls and Kellogg's Shredded Wheat and someone came in the store and asked for shredded wheat I would give them the Niagara Falls product. If someone asked for Kellogg's Shredded Wheat I would give it to them provided I handled it; after I found out it did not sell I did not buy any more.

MRS. FLORENCE STIBELING.

Deposition taken in Cleveland, Ohio, December, 1932

DIRECT EXAMINATION.

I keep house, am not related to anyone in the Biscuit Company, but one of the salesmen is a friend of mine. He recently asked me to make a purchase of shredded wheat for him which I did at a Y grocery and meat store at 168th and Euclid. I went in there, purchased four articles and asked for shredded wheat and was handed a box of Kellogg's Wheat Biscuit. I said, "Well, this is not shredded wheat," and he said, "No, but it is the same thing, only the biscuit are smaller." That is all that was said; he gave me a purchase slip and I have the slip and carton with me. The package of whole wheat biscuit I gave to Mr. King, the salesman, and wrote my name at the bottom of the slip.

(The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 42-A,"

and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 42-B.")

CROSS-EXAMINATION.

Yes, I asked the grocer for a sales slip. Mr. King told me the store to go to, to ask for shredded wheat and to take whatever was given me and to remark that it was not shredded wheat. He also refunded the price of the wheat to me. When the package was handed to me I immediately knew it was not the Niagara Falls Shredded Wheat, as I had seen that package on the shelves in the store some three or four months before. The first time I saw it I knew it was a shredded wheat product and that the package was different from the Niagara Falls package, but this was the first time I had bought any of it. I had been buying the Niagara Falls Shredded Wheat for myself and this is the only time that anybody handed me Kellogg's Shredded Wheat.

HARRY C. ROHN.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I am twenty-nine years of age, business—locksmith. I am not employed by the National Biscuit Company or related to any of its men. I recognize Plaintiff's Exhibit No. 1 as shredded wheat which I have been familiar with ever since I can remember, having used it at home, and it happens to be my favorite breakfast dish. When I ask for shredded wheat I expect to get Shredded Wheat and that means to me a little shredded wheat biscuit. The wife does all the buying. I do not see the package itself, hence I cannot say that it is associated with any place in my mind.

I recognize Plaintiff's Exhibit No. 1 as a shredded wheat biscuit.

Yes, I have asked for shredded wheat and have received something else. This happened last week Saturday at Huff's restaurant. I asked for an order of shredded wheat and received Kellogg's. It was served to me in a bowl, but I happened to see the package that it came out of before it was served to me in the bowl and I said "This is not shredded wheat." And, the waitress replied, "Sure it is. Doesn't it look like it?" She also said, "That is what we serve for shredded wheat." There were two biscuits served—I ate one of them. I asked for the carton they were served in and have same with me.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 43.")

CROSS-EXAMINATION.

Nobody asked me to get the carton, but the girl said it was shredded wheat and I said "it is not". I just wanted to prove to her that it was not shredded wheat. I ate one of the biscuit and it did not taste like the one you have here, the Niagara Shredded Wheat Biscuit. It tasted something like it but there is a difference. I think I could say that I know there are two shredded wheat biscuit on the market which have a somewhat different taste, one compared with the other. One of these is made by the Niagara Falls people and one by the Kellogg people.

After I got this carton I think I ran over here to the National Biscuit Company's office because there is a friend of mine that works over here and I breakfasted with him. At that time I came over here with him at his request but I made no written statement. His name was Mr. Gray and I gave him the carton. He is connected with the National Biscuit Company and happens to be

a friend of mine who took me to this restaurant. I do not remember whether he paid for this Kellogg Shredded Wheat. He had a breakfast but I do not know what it was. It was not at his suggestion that I asked for and retained this Kellogg carton. I did it purely to satisfy the young lady that it was not shredded wheat. I did not mean to say that it was not shredded wheat made at Battle Creek, Michigan. I mean that it was not the shredded wheat that I am used to eating. I meant that those two shredded wheat biscuit that came out of that carton were not shredded wheat biscuit made by the National Biscuit Company at Niagara Falls. I did not tell her that I simply told her "that is not shredded wheat." Nobody ever told me that it was not shredded wheat unless it was made by the National Biscuit Company. We just went there but it was by no suggestion of his that I made this purchase or any purchase. He suggested we go to that restaurant but he did not ask me to order shredded wheat.

That is the only experience of that kind I have had.

RE-DIRECT EXAMINATION.

The reason I said to the waitress, "that is not shredded wheat" is that I seldom eat breakfast in a restaurant but at home for breakfast we get a large cake like that and that is what I am used to. And I think that is the first time I ever ran into the little biscuit. And it did not look like what I am acquainted with. That is why I said, "It is not shredded wheat." So when I asked this waitress for shredded wheat I had something definite in mind that I expected to get and that something was the shredded wheat biscuit I had previously eaten so much of.

RE-CROSS-EXAMINATION.

RXQ. 67. Mr. Rohn, if you went into a restaurant from now on and wanted to get this large biscuit, would

it not occur to you to ask for the Niagara Falls Shredded Wheat?

A. Well, I do not know. With me, shredded wheat is Shredded Wheat.

THE WITNESS: If I had liked this Kellogg product so much that I would have liked to have some more of it I would have asked for Kellogg's Shredded Wheat when I was in this restaurant. It was the first time I had ever heard of Kellogg's Shredded Wheat. I am now thoroughly educated to the fact that there are two shredded wheats on the market; one that is the Niagara Falls product and one the Kellogg product.

FRED LEIGHTON.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

I live in Lakewood, a residential suburb of Cleveland, and am in the business of grocery and fruits, conducting a service grocery store. My clients are middle class people. I have no charge accounts but run a cash and carry store. I have been in the grocery business since 1918 and have been with every chain except the Clover Company. I have had my own store for 2½ years and during all my experience have been actively connected with the management of retail grocery stores and the handling of products in those stores with which I have been connected in various capacities as salesman and sales manager.

I have been familiar with cereals and recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and the contents which is called shredded wheat, the only name I know it by. I have been familiar with it as long as I have been in the grocery business and longer. I sold

Shredded Wheat when I was only a boy 14. I worked in Canada and I also went through the Shredded Wheat factory twenty-six years ago back in Niagara Falls. Shredded Wheat means to me just the one name, what it implies: Shredded Wheat.

When a customer asks for shredded wheat we give her Shredded Wheat, that is all she knows it by. It is practically all I know shredded wheat by. Just the one word is what it implies. That is all it means, a biscuit in its shape and form. When a customer asks for shredded wheat she only knows shredded wheat. When a customer comes in and asks for Shredded Wheat we give her a package of Shredded Wheat as we have always known it. I would not give a customer anything else than a package like Plaintiff's Exhibit No. 1 if she asks for shredded wheat. The buying public already has that one package in mind. She has that in mind as shredded wheat and she knows the package is a package of shredded wheat. That is all she simply knows.

I have carried Kellogg's Whole Wheat Biscuit. I do not carry it today because I do not have any demand for it. That is, when you ask for shredded wheat—and I did have what they had—the Kellogg's biscuit on the shelf, and I just disposed of it as shredded wheat, because I wanted to get rid of it. I had no demand for the Kellogg's biscuit, because, when they asked for shredded wheat, they wanted Shredded Wheat. And I had quite a time to get a demand for the Kellogg's biscuit. I did not give Kellogg's Whole Wheat Biscuit only when a customer asked for Shredded Wheat and I wanted to dispose of Kellogg's. I asked the woman would she take it. I gave the customer a good price. In fact, I gave it to her at lower than cost, to get it off the shelf, because I had quite a time to get it off the shelf. I told them it was shredded wheat and I said it might not be just the same, but they led me to believe

it was just the same; but, if she did not like it, I would gladly give her the money back. And I had a couple of different women there who really refused to take Kellogg's biscuit. One of them says, "Mr. Leighton, I have dealt with you quite some time, and I really believe what you tell me is true; but give me Shredded Wheat." Well, I said, "This is shredded wheat." She says, "No, I do not want it. I just do not want it. That is all." "I want Shredded Wheat," and I said "That is all right." I gladly gave it to her. I am familiar with the shape and appearance of the Kellogg's Biscuit.

Q. 32. What do you say as to the shape and appearance of the Kellogg's Biscuit.

A. Well, I would say that shredded wheat in biscuit form—that is, just a—well, there is a biscuit right there in front of me, and the customer knows it as Shredded Wheat. Now, you take—I really truthfully believe that Kellogg's putting out this Whole Wheat Biscuit is nothing more than a camouflage to deceive the customer, to make her believe that she is getting something that is a shredded wheat. That might be. But I really believe that it is nothing more than a clever camouflage to infringe the Shredded Wheat people.

I have seen a box like Plaintiff's Exhibit No. 10 and recognize the picture of the dish with biscuit in it. The Shredded Wheat Company used that carton with the picture of a dish on it a long, long time ago. So far back that I would not want even to say what I guess.

I have seen a strip like Plaintiff's Exhibit No. 35 recently because I have painted the price in there on the white space and used it in my own store.

CROSS-EXAMINATION.

I would rather handle just one kind of shredded wheat than two and one kind of Corn Flakes. There is only one Corn Flake, Kellogg's, the leading brand, and

if people just say corn flakes I give them Kellogg's. There is not much competition in these foods. We handle one Bran Flake—Post's. Kellogg's has a Bran and we handle their All-Bran but when people want Bran Flakes we give them Post's. It is just like a woman coming in and asking for a bar of soap. If she asks for a bar of soap, we naturally give her the P. & G. soap, unconsciously, maybe.

We do not often get better treatment from one manufacturer than another. They have all got that price. They all offer deals and when one makes a price the other follows.

XQ. 69. Assuming that there are no patents to prevent anybody from making a shredded wheat product, you do not think, do you, that there is anything morally wrong if a concern comes along and makes a shredded wheat, also, as long as they put their own distinguishing trade-marks on that package?

A. Well, yes. I do not just agree with you there. They could come out with an item that should be entirely different. I think that, for instance, it should not be a biscuit of that same type or form as Shredded Wheat. They are more or less camouflaging and deceiving the public. That is my idea.

WITNESS: From my chain store experience I know there are many brands of Corn Flakes but I do not feel that it was wrong for others to manufacture Corn Flakes in competition with Kellogg when he had started it. Post does not just put on there Corn Flakes but I would be a little prejudiced and feel that it was unfair to put out a corn flake as a competitor. I would be better satisfied to have one kind of Bran Flakes and one kind of Corn Flakes and one kind of shredded wheat. It would be simpler for me as a grocer.

RE-DIRECT EXAMINATION.

When a woman comes in and asks for a pound of sugar I would give her a pound of whatever sugar I may

have. There are many products like that but Shredded Wheat is Shredded Wheat; that is all. It is in a different class from ginger snaps or sugar or other common articles of trade. It is a cereal and it has a reputation.

RE-CROSS-EXAMINATION.

RXQ. 95. Mr. Leighton, it is true, is it not, that you, as a grocer, now know that there are two distinct brands of shredded wheat on the market; one made by the Kellogg Company at Battle Creek, and the other made by the National Biscuit Company at Niagara Falls?

A. No, I know only one. There is only one Shredded Wheat.

RXQ. 96. Yes, but I mean, do you know that the Kellogg Company is making a shredded wheat product?

A. Well—

RXQ. 97. Have you heard that in the trade?

A. I have tried to sell it as such.

WITNESS: I know that Kellogg's have a biscuit that they are trying to say is Shredded Wheat but I do not say it is Shredded Wheat. But I only know one biscuit as Shredded Wheat—put out by the Kellogg Company, I do not know—but they are trying to make the public think it is such. I do not know whether the Kellogg Biscuit is a Shredded Wheat product but I think they are trying to infringe on Shredded Wheat. They are so much alike that you would not know whether one was Shredded Wheat and one was the other biscuit, and if you cut them down to the same length I could not tell one from the other.

I can tell Post's Bran Flakes from Kellogg's Bran Flakes absolutely. Even a blind man can see the difference in appearance. My idea of interference here is that these two products are two near alike and I

think the Kellogg Company should make some other kind of shredded wheat product that would be sold regardless of price. Even if the new product were offered at half the price it would not do any good. I would have to do too much advertising or talking to people as compared with selling Shredded Wheat. I would have to use a lot of sales talk and would have to put on a whole bunch of clerks. And even if the cost would be less my profit would be just the same. It would be better to use Shredded Wheat even though I would charge her twice as much.

NICK PYROS.

Deposition taken in Cleveland, Ohio, December, 1932.

DIRECT EXAMINATION.

For nine years I have run a restaurant at 8305 Harvard Avenue. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, the kind I use. I know no other kind. When my customers ask for shredded wheat I supply them with just Shredded Wheat and that is the kind I use. I recognize the glass globe, Plaintiff's Exhibit No. 36 that came from the Shredded Wheat Company six or seven years ago. It has been in my place nine years. I found it there when I took the place and it had Shredded Wheat in it made at Niagara Falls. I recall the Shredded Wheat man putting the biscuit in the globe a long time ago. The date is on a piece of paper on the bottom, December 2, 1925. I had the globe on display right in the front window all the time that it was in the restaurant until day before yesterday when it was taken out.

CROSS-EXAMINATION.

I sell Shredded Wheat in individual cartons and have for many years. We had the big packages too and

if I ran short I would get it from the grocery store. I have heard of Kellogg's Shredded Wheat but never knew anyone that used it. It was offered to me about a year ago but I refused to take it.

FLORENCE BERNARD.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I have no occupation and am not related to any of the employees of the National Biscuit Company but have friends in the organization. I recognize Plaintiff's Exhibit No. 1 as shredded wheat which I have been familiar with all my life—twenty-three years. The expression shredded wheat to me has always been a breakfast cereal, something that I did not like—tried to get out of eating. I only eat breakfast cereal when I am forced into it. I do not know much about its origin. I have never known any other article than the article in this package, called Shredded Wheat. I recently went in a store and asked for Shredded Wheat and was given something else. That was on December 12th in a grocery store at the corner of Percival and McLean. I was waited on directly by a boy—I imagine of high school age—but the proprietor of the store was the one selling me the goods, although I paid the boy. I asked the boy for a bag of pure Buckwheat Flour, he was unable to find it, he then called another boy and he could not find it, so the proprietor was called and he was unable to find it, so he told me he did not have any but would have it on the following day. I then asked for butter and a package of Shredded Wheat. The boy was standing directly in front of the case or wall, where cereals of all sorts were sold, and he looked at the shelves and said, "Hain't we any Shredded

Wheat?" The man said, "Why, yes, we have. It is right in front of you." The boy looked and looked and said, "Well, I cannot see any Shredded Wheat." The man came over and said, "Well, it is right in front of you." And he took down a package and handed it to the boy, who said, "Is this Shredded Wheat?" The package was then handed to me and I said, "Is this Shredded Wheat? It is not the package I am accustomed to purchasing. That has a picture of Niagara Falls." The man said, "Well, yes, it is shredded wheat, you are getting fifteen biscuit—it is a better size for serving." I have the carton given to me with me—on it is written my name in my writing, the contents were taken out and the package turned over to the National Biscuit salesman.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 44.")

CROSS-EXAMINATION.

Cullen is the only one I know connected with the National Biscuit Company, he took me to this store and paid for the things I bought and was within about two blocks when I made the purchases. He did not ask me to go to any other store and this is the only time anything of this kind occurred to me.

MRS. C. COE HARRIS (Arthur D.)

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a housekeeper, not related to anyone in the National Biscuit Company. I recognize Plaintiff's Exhibit No. 1 as the Niagara Falls Shredded Wheat. The contents look like Niagara Falls Shredded Wheat. I

have been familiar with it for a number of years, a long time. I buy it for the children, I am not particularly fond of it myself. I have had occasion to ask for it and receive something else, that was at the College Inn Cafe in Flint, Michigan, at the corner of Detroit and Second Avenue, on December 13th. This is a cafe, I picked up the menu, looked it over, and saw Shredded Wheat on it and ordered it, and half a grapefruit and a cup of coffee. She brought me the package which I have in front of me. When she handed it to me I asked her if she would serve it for me and she said, "Sure." I said, "Isn't that a cute little Box? This is different than what I have been used to buying. Have you no Niagara Falls Shredded Wheat?" She said, "No; but I think this is real good." I accepted it and ate it. That is not my writing on the printed slip. Yes, I identify the box, my name is on it and there is half a stick of gum inside. I took the box out to the car and took it home and showed it to Mr. Paine, the National Biscuit man, and gave him the box.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 45.")

CROSS-EXAMINATION

I had not been in that restaurant in a long, long time. I am in the habit of eating in Flint when I go in, regardless of the time. I usually do not go in there; but lately, I have been in the habit of going to the Home Dairy. Mr. Paine asked me at one time to go in any place, where I was, ask for Shredded Wheat and see what they gave me and to keep the carton. When the girl came back she asked me how I liked the Kellogg's, and I said, "It is real good." And she said, "We think it is real good." She did not say that she offered to substitute it or that she thought it was better or anything like that. She just simply said that they thought it was real good.

HAROLD O. YORKE.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a chiropractor and am not related to any one connected with the National Biscuit Company. I recognize Plaintiff's Exhibit No. 1 as a package of Shredded Wheat and the contents as Shredded wheat biscuits which I have been familiar with ever since I was a kid, as far as I can remember back. Shredded wheat conveys to me a biscuit made at Niagara Falls. We used to look for that on a package to identify it. There has never been anything the same as that, as far as I know.

I never had occasion to ask for Shredded Wheat and receive something else until I got this package in the Owen Grocery on Livernois Avenue one day last week. I went in and asked for Shredded Wheat and the woman said, "This is better than Shredded Wheat. It has got more biscuit in it, and you are foolish to buy the other stuff." And she said, "We do not sell that big Shredded Wheat. We only sell this." This is the package I got, I used part of the contents; the writing on the slip pasted on the package is my signature in my writing.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 46.")

CROSS-EXAMINATION.

I knew as soon as I saw the package that it was not Niagara Falls Shredded Wheat. I made the purchase at the request of Mr. Smith, a salesman for the National Biscuit Company and a friend of mine. He asked me to go to this store and make this purchase—I have gone in there and bought things at different times. I

paid for the package and Mr. Smith refunded the money. I ate some of the biscuit but did not like it as well as Shredded Wheat. I have a little girl who has eaten Shredded Wheat ever since she started to eat cereals and I am a constant consumer of it myself. There is a difference in the taste and I do not like the Kellogg's Shredded Wheat as well as the Niagara Falls.

EPHRAIM McCLELLAN.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I live in Fenton, about eighteen miles out of Flint. I am a retired electrical engineer at which I worked all my life until a few years ago. Plaintiff's Exhibit No. 1 is Shredded Wheat, by the look. You cannot be sure about the contents. It might be and it might be Whole Wheat. I think we have been buying it for twenty or twenty-five years and possibly a little longer. When we asked for Shredded Wheat we expected to receive Shredded Wheat, of course, which meant a very good breakfast food; and the children liked it especially. They called it Shredded Wheat.

Mr. Paine took us around and dropped me in front of a store in Flint, I do not know where it was; I went in and called for a package of Shredded Wheat and he showed me this package, you see, and I looked it over and I said, "Haven't you the Shredded Wheat?" And he said, "No, we do not handle it." He said, "We think this is just as good or a little better." And he said, "The Shredded Wheat is owned by the big syndicates, and Standard Oil has money in it." And he says, "We are cutting that out." I paid for the package and took it away with me. I did not write what is on

that piece of paper but that is my name on it and the figures 12/13/32.

(The package referred to was received in evidence and was marked "Plaintiff's Exhibit No. 47.")

CROSS-EXAMINATION.

Mr. Paine did not take me to any store except this one where I made the purchase and he refunded to me the purchase price of the Kellogg's Shredded Wheat. My niece, Mrs. Harris, and I drove in from Fenton today at the request of Mr. Paine. Detroit is about fifty-six miles, something like that, from Fenton. I knew as soon as I saw the Kellogg package that it was not the Niagara Falls Shredded Wheat. I never opened the package but turned same over to Mr. Paine and he had it until I saw it here this morning. I have known Mr. Fenton four or five years; he is the National Biscuit Company man around Fenton.

JOSEPH C. MELLOURE.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a bookkeeper and am not connected with the National Biscuit Company. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have been familiar with nearly all my life. About twenty years. Shredded wheat to me means a breakfast food and when I ask for Shredded Wheat in a store or restaurant I expect to get Shredded Wheat Biscuit. I have never known more than one Shredded Wheat.

On the twelfth day of December I went into the Eighth Street grocery in Flint to purchase a box of Shredded Wheat; he did not even say that he did not

have it. He put out one of Kellogg's packages. And when I questioned it as to whether it was Shredded Wheat, he immediately opened the package and explained that it was not the Shredded Wheat that I had been buying, but that it was the same thing, with more biscuit in the box, that it was electrically cooked, whereas, the original was baked with gas, and that, if I was not satisfied, my money would be returned; and that that was what most of them were then purchasing, meaning most of the customers.

I examined the biscuit inside the package, they looked about the same as I had always bought; maybe, smaller. I took away the package of Kellogg's Whole Wheat Biscuit that I purchased and can indentify it by my name and the date which I put on it. This is not the package that he opened for me, it was another similar to this one.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 48.")

CROSS-EXAMINATION.

Mr. Woods, salesman for the National Biscuit Company, asked me to make this purchase. He took me to the neighborhood and told me where the store could be found and later on he came and got me. I did not go to any other store. I had no previous experience with the Kellogg's Shredded Wheat and had never seen it before, nor heard of it before. I had never known of more than one shredded wheat product previous to this. I know now that there are two such products, one made by Kellogg and one by the Niagara Falls people. I was driven down this morning by the National Biscuit Company local man's car. His wife was the only other person in the car. Flint is from between fifty, and—about fifty-five miles from Detroit.

FRED SELL.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a retail grocer since 1894, in business always in Detroit. My store at present is a small cash and carry; I used to have a larger one. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and the contents as Shredded Wheat which I have been familiar with fifteen or twenty years, probably. It has a great reputation with us because the public demands it and when the public asked for shredded wheat they expect to get the box right here same as Plaintiff's Exhibit No. 1. I make this statement from my experience with the purchasing public. I have never had any substitutions for Shredded Wheat, just this here, all the time. I have never handled Kellogg's Whole Wheat Biscuit and do not know that I have ever seen it. I never was offered this. When I got Shredded Wheat I asked for Shredded Wheat and never took anything else.

I do not remember ever having seen Plaintiff's Exhibit No. 48. By covering up the name on it, it looks as though the package contained Shredded Wheat. I believe I did handle Shredded Wheat in a package like Plaintiff's Exhibit No. 10. I do not really remember if the picture of the dish was on it, but I do recall the picture of the factory on the front panel. The picture of Niagara Falls is familiar to me on plaintiff's exhibits.

CROSS-EXAMINATION.

Today is the first time I learned that the Kellogg Company had a shredded wheat product on the market and I now know that there are two shredded wheat products made, one by Kellogg and one at Niagara Falls. I never knew the difference, because I only know the product in Plaintiff's Exhibit No. 1.

I would say that the contents of Defendant's Exhibit No. 6 are shredded wheat. The Niagara Falls product is a little longer. Yes, I handle Kellogg's Corn Flakes and recognize a family resemblance between the corn flakes package and the Kellogg's Whole Wheat package. The colors and dress look about the same and I recognize a clear distinction between this package and the Niagara Falls package.

RE-DIRECT EXAMINATION.

Some of the purchasing public behaves one way and others another. They come in, and if I would hand them a different package they might take it, and probably they would bring it back if I would not explain it first. Or, she might say right away, "That ain't Shredded Wheat" you see. Some of the purchasers are less careful than others as to what they buy. When a customer asks for shredded wheat I would give her that package there—pointing to Plaintiff's Exhibit No. 1. I would never give her anything else.

CROSS-EXAMINATION.

I never knew about Kellogg's Shredded Wheat until today. I handle Kellogg's corn flakes, also Post's corn flakes. If a customer just asks for a package of corn flakes I would give them Kellogg's unless they asked for Post's. If they asked for Kellogg's Shredded Wheat I would tell them that it is all I got, meaning Niagara Falls Shredded Wheat.

RE-DIRECT EXAMINATION.

If a customer demanded Kellogg's Whole Wheat Biscuit I would go to a wholesale house and buy a dozen or whatever I could get to please the customer. It would be foolish for me not to do it.

MYRTLE GREENE.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a housekeeper and not related to anyone in the National Biscuit Co. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, made by Niagara Falls, National Biscuit Shredded Wheat. Well, really, I do not just exactly recall how long I have been familiar with it, but it is quite a number of years.

The term shredded wheat means to me that it is whole wheat biscuit, and I know that the doctors are prescribing it, and it seems to be very good for you. When I ask for a package of Shredded Wheat I expect to get Niagara Falls Shredded Wheat, a package like that, pointing to Plaintiff's Exhibit No. 1. This morning I had occasion to stop at the Victory Lunch, I went in and ordered Shredded Wheat and coffee and the girl took a Kellogg's Whole Wheat Biscuit out of the drawer; and I asked her if it was Shredded Wheat. And she said, "That is the only shredded wheat we have." So, of course, I cancelled my order. And I was at Cunningham's a few days ago, and I asked for Shredded Wheat, and she gave me Kellogg's Whole Wheat. And they threw the package away, but you can recognize it instantly when you taste it. It was in Cunningham's drug store that I had Kellogg's Whole Wheat Biscuit served to me in a dish outside the package. I asked if that was Shredded Wheat, and the girl said, "Why, yes, that was shredded wheat." And I asked if I could see the package and they had thrown the package in the incinerator. And they went and got the package and here it is, Kellogg's Whole Wheat Biscuit. The package is identified by the initials on it in pencil.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 49.")

That experience has happened to me four times in the last two weeks in restaurants.

CROSS-EXAMINATION.

The National Biscuit Company man sent for me today and he was with me when I stopped in this restaurant. He did not suggest to me that I order shredded wheat. I have eaten it for the last two years every morning for breakfast. If Kellogg's Shredded Wheat should come into general use I would stop eating shredded wheat as I would not eat any other product than Niagara Falls Shredded Wheat. I had this package of Kellogg's biscuit from Cunningham's this morning. It did not make me ill but it does not taste like a hundred per cent. whole wheat biscuit to me. There seems to be some other ingredients in there. I have been eating Niagara Falls Shredded Wheat every day for about two years. I have no personal friends in the Biscuit Company, but I have been with drug companies previous to now and I have had salesmen calling on the drug store, otherwise, I do not know of any one with the National Biscuit Company. I was a soda fountain manager in a couple of drug stores and came in contact with a number of National Biscuit salesmen. I told my experience to Mr. Feldman and he asked me why I did not report it to the company, and when this came up he called me and told me that now is the time, if I wanted to present my package, to bring it in.

I think if I were blindfolded I could tell the difference between the two shredded wheat biscuits. I do not believe there is any great difference in the size between the two biscuit but there is a difference in the taste. If you are accustomed to using a certain kind of

shaving cream all the time and then are given a different kind, even if it is just as good, you do not like it as well and it is the same thing with this: if we order Shredded Wheat and they give us something else, we would not like it. It is the same thing. It all comes under the same heading. We want what we order.

MRS. FLORENCE L. COWLES.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a housewife and am related to Mr. Diesing of the National Biscuit Company, who is my uncle. He is a salesman of the National Biscuit Company.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have been familiar with for about fifteen years and which I use in my home. When I ask for Shredded Wheat in the stores I expect to get the package with the picture of Niagara Falls on it. Shredded Wheat has never meant any other product to me. Recently I had an experience with the purchase of Shredded Wheat—this was over on Third Avenue at Dave's grocery store on the twelfth day of December this year. I walked in the store and asked for several articles, among them Shredded Wheat. She placed a box of Kellogg's Whole Wheat on the counter and I said, "Is this Shredded Wheat?" and the lady said "Yes." I said, "I thought the Shredded Wheat had a picture of Niagara Falls on it." And she said, "Well, this comes from Niagara Falls,"—meaning the Kellogg package which she placed on the counter. I asked her whether it was just as good as the other package that I referred to and she said, "Yes, just as good." This is the package and I have my initials on the bottom and it is the package that she had reference to when she

said, "This comes from Niagara Falls." The paper bag contains an itemized list of the things I had purchased—that is the clerk's handwriting. A

(The paper bag referred to was received in evidence and was marked "Plaintiff's Exhibit No. 50-A"; and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 50-B.")

CROSS-EXAMINATION.

My uncle asked me to go to this store, to make this purchase and to get some sort of a bill for it. I gave him the whole package, I did not keep any of it. I have never eaten any of Kellogg's biscuit.

MRS. CLARA WESTPHAL.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a housewife, not related to anyone connected with the National Biscuit Company. I am familiar with the package called Plaintiff's Exhibit No. 1. It is Shredded Wheat which I use in my home and have been familiar with quite a long time. When I ask for shredded wheat in a grocery store I expect to get the National Biscuit package with the picture of Niagara Falls on it. I have always received this package until just here lately when I went to Shubert's, up Warren Avenue, on Monday of this week and asked for a package of Shredded Wheat. The lady handed me a package; and I looked at it and I told her it was not the kind I always got. And she said it was just as good as the other kind. What she gave me was a package of Kellogg's and I have here the package that I got which I can identify by my initials right on there. I had nothing to do with the piece of paper pasted on the end.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 51.")

I never knew there was a Kellogg's Shredded Wheat until just here recently, when I went to the store and the minute this package was handed to me I knew it looked different and I told the clerk it was not the kind I have used. Now that I know there are two kinds on the market I would specify the next time that I wanted Niagara Falls Shredded Wheat.

Shubert's store is not my regular grocery store. I went there at the request of Mr. Bernier, a neighbor of ours who is connected with the National Biscuit Company. He just asked me to go in there, ask for a box of Shredded Wheat and take whatever they gave me. He later refunded to me the purchase price. He drove me to the store and waited for me outside. I turned over the entire package to him and did not use any of the contents.

ANDREW B. MACELROY.

Deposition taken in Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I buy some goods for G. & R. McMillan's, wholesale and retail grocers, and I have charge of the coffee department over there. They have been in business since 1848 and I have been connected with them about thirty years. They have a retail store where goods are sold to the public at retail and they also do a wholesale business in all lines of groceries in the same building. They are the largest grocery store in the State of Michigan.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat made in Niagara Falls which I have been familiar with about thirty years. If I were waiting on a

customer and she asked for shredded wheat I would give her the original package of Shredded Wheat made in Niagara Falls. That is the first package I have seen. I have seen the Kellogg's so-called shredded wheat under a different name. I have seen Shredded Wheat advertised in magazines and street cars and the papers for quite a number of years. Shredded Wheat has a reputation among the public, so far as the quality is concerned, it has a good reputation. We sell great quantities of it and have sold quantities of it for the last twenty years. G. & R. McMillan's have published 13 catalogues, the one you have in your hand now was published in 1913 and 1914. We had them in the store, thousands of them distributed among the public. The items that are carried in that catalogue are items that are offered for sale by G. & R. McMillan and were stocked by them at that time.

(The catalogue referred to was received in evidence and was marked on the page designated, "Plaintiff's Exhibit No. 52.")

THE WITNESS: We have those catalogues even at the present time. They are published every year.

The words Shredded Wheat referred to in the 1913 catalogue referred to the Niagara Falls product. I could not tell you whether subsequent catalogues have similarly carried that.

CROSS-EXAMINATION.

I buy some of the cereal for our concern. I might have seen Kellogg's product and not paid any attention to it. I do not buy their product. We handle some of the Kellogg's package goods. Our house is the largest wholesale and retail house in Michigan. They have handled some of Kellogg's Whole Wheat product; I have seen the package in the house and I have seen corn flakes and such as that. I know now that there

are two shredded wheat products on the market. In 1913 I was not connected with the buying end of the business. I never heard of the Ross Biscuit back in 1913; they might have handled it.

Mr. Freeman, of the National Biscuit Company, asked me to come down here today. I have known him for a number of years but he is no particular friend of mine. During all the time that I have personally known anything about Shredded Wheat referred to as Plaintiff's Exhibit No. 1, I have associated Niagara Falls with that product. This is the first time that it has been called to my attention that Kellogg's had a shredded wheat product on the market and I shall look to see if we have any when I go back to the store. I have no doubt about it now that there are two shredded wheat products on the market. If a customer asked me for Shredded Wheat, I would naturally give him the Niagara Falls and if he asked for Kellogg's Shredded Wheat I would give it to him.

RE-DIRECT EXAMINATION.

If a customer merely asked for shredded wheat I would certainly give him the product that has been on the market for years and it is a well-known product. If a customer asked me for Kellogg's Shredded Wheat, I would give him Kellogg's. That is what the clerks have been instructed to do—not to sell people what they want to sell them, but to sell them what they ask for.

RE-CROSS-EXAMINATION.

I know we handle Kellogg's Corn Flakes but I do not know what other kinds we handle. If a person ordered Corn Flakes I would give them Kellogg's because that is the only one I know. I do not know the other corn flakes at all.

HARRY O. PLANZ.

Testimony taken at Detroit, Michigan, December, 1932.

DIRECT EXAMINATION.

I am a retail grocer and have been in business for myself about eight years. I have been connected with the grocery business for nineteen years. I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat which I have been familiar with all my life. I think the form, appearance or shape of it has remained just about the same, as far as I can remember.

When a customer asks for Shredded Wheat we naturally go to that style of package with the picture of Niagara Falls on it. In fact, that style of package has remained just about the same for the last eighteen or nineteen years.

The words "shredded wheat" to the housewife, in my opinion, is that particular serving. A lady would not know what to ask for if she did not ask for Shredded Wheat. I have never heard it called any thing else.

Q. 17. Would you say, Mr. Planz, or would you be able to characterize for us this expression "shredded wheat" and the position that it holds, if any, in the minds of consumers?

A. At the present time, my idea is that the customer has in mind that there is only one Shredded Wheat, that there is only one package of that type there, and that they are sold on that idea, that that is what they want. If that very same item there were put under another name, I doubt whether you could sell it. It is Shredded Wheat. It has been that product and it is sold as Shredded Wheat, if that is what you mean.

I do not think the sale of a product that was put out under slightly different name; say, "Whole Wheat Biscuit," which was made with a similar appearance to

Plaintiff's Exhibit No. 1 would be near as good as Shredded Wheat. To sell such a product you would have to use the words "shredded wheat" or say it was the equivalent of Shredded Wheat or like Shredded Wheat.

I recognize Defendant's Exhibit No. 6. I do not recall in the advertising of the Shredded Wheat Company the use of a dish with biscuit in it. If I saw this package with the name obliterated I would say it looked like Shredded Wheat.

CROSS-EXAMINATION.

We handle Kellogg's Whole Wheat Biscuit. We do not recognize this in our store as Shredded Wheat. We just call that Whole Wheat Biscuit, what it says on the package. If the picture were not on there it would not be possible to tell for the first time what was in the package. It might be one of six or seven different products. Of course, people would not buy it until they knew what was in there; but I would never recommend to the salesmen to sell this as Shredded Wheat.

RE-DIRECT EXAMINATION.

By MR. VILAS:

RDQ. 32. Would you consider selling Kellogg's Whole Wheat Biscuit as Shredded Wheat, like Defendant's Exhibit No. 6, as misrepresentation? You say you never misrepresent.

A. We never misrepresent, and I would not want to commit myself as doing such a thing.

RDQ. 33. If it were done.

A. Well, I will just change that question. If the lady says, "What is the nearest thing you have to Shredded Wheat?" we might recommend this, if you put the question that way.

RDQ. 34. Yes, but if she said "shredded wheat," and the grocer or clerk gave her Defendant's Exhibit No. 6, would you call that a misrepresentation?

A. Yes, I would call that misrepresentation, if he gave her this for Shredded Wheat.

MR. VILAS: May we stipulate that W. Cook, Boston and Dexter Boulevard, Detroit, Michigan, if called, would testify that he is a retail grocer in Detroit, that he handles the Shredded Wheat of the National Biscuit Company, formerly made by the Shredded Wheat Company, that he has known it for several years, and that, when customers ask for shredded wheat, the order is always filled with the product of the plaintiff?

MR. CLARKE: Yes, without prejudice to my objection that the subject matter of it is irrelevant and immaterial. And may it be further stipulated that said witness would also testify that customers who ask for corn flakes mean Kellogg's Corn Flakes in practically every instance, and that, where a customer asks for corn flakes, the grocer gives them Kellogg's?

MR. VILAS: Yes, subject to my objection.

MR. CLARKE: Certainly.

MR. VILAS: The taking of the depositions at Detroit is closed.

STANLEY A. MICHALAK.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am an accountant and have been doing work for the Western Electric Company.

I have been familiar with Shredded Wheat for a good many years because it is the brand that we have always used in our home.

I often order Shredded Wheat and cream for my lunch in restaurants. Recently, at Pixley & Ehlers, a restaurant located at 68 South State Street, Chicago, I asked for a bowl of Shredded Wheat and a cup of coffee. The counter clerk reached down under the counter (I had noticed that it had not been the National Biscuit Shredded Wheat that I had been receiving—it was a different type of package) and as he was doing that, he seemed to try to conceal something. He had his back facing me. Just as he slit open the package and was going to empty it into the bowl, I said, "Hold everything. That does not look like the thing I want."

The clerk tipped it out in the bowl, and he said, "Sure, that is the thing." And then he tried to explain to me what the difference was. He said that was Shredded Wheat and that was the thing.

I got hold of the menu card and I told him, how come that they have Shredded Wheat on the card, and then when you ask for Shredded Wheat you get some other brand. He started to tell me something about the patent and the rights expiring on some particular patent, but I did not get all of the paraphernalia.

I took away the menu card and on the back thereof wrote a brief story of what I had witnessed. I also took away the carton. (The slip referred to was received in evidence and was marked "Plaintiff's Exhibit No. 53-A"; and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 53-B.")

A thing I have often thought about is the infringement on the good-will of National Biscuit Company. Let me explain—I understand—in fact I know—that National Biscuit Company has put out a product of good quality and worked up a good name and received the good-will of the people. And, naturally, a customer goes into a restaurant, and in a place of that kind he

asks for Shredded Wheat, and if they give you something else, it looks rather bad. It is more or less of an infringement, I think.

I know that the National Biscuit Company has conducted a rather extensive campaign advertising Shredded Wheat. I think that other people have also noticed this campaign. I also think that other people would rather have that than any other brand. I think if I was in another line of goods I would rather have the National Biscuit than any other item; I have tried other goods and naturally I always go back to the National Biscuit, because I know they carry a good line of goods.

CROSS-EXAMINATION.

THE WITNESS: I have never tried any of the Kellogg's cereals. No matter what kind of breakfast food I try, I always go back to National Biscuit Company's Shredded Wheat.

A personal friend of mine, Mr. Camphausen, who is connected with the National Biscuit Company, asked me to make this purchase at Pixley & Ehlers.

I called the matter of substitution to his attention and he asked me to come here as a witness.

The only time I have seen the Kellogg biscuit was the other day when the waiter tried to show me a slight difference between the two.

When I say shredded wheat biscuit I mean Shredded Wheat Biscuit made at Niagara Falls.

MR. CLARKE:

XQ. 62. Do you now know that the product which I call shredded wheat biscuit is coming from two different sources of manufacture? Have you not had experience with at least two different makes of shredded wheat biscuit?

A. 64. Two products alike; but, as far as the product itself is concerned, I do not know—that is—the

make-up of the thing, whether it is the same or not. It may have a different taste. I do not know. One may be more crisp than the other, and things of that kind.

THE WITNESS: It is a fact that I have encountered these two different products which look alike, served in packages which do not look alike, but I always associate Niagara Falls with the brand that I have always used.

Mr. Camphausen paid the bill at the restaurants we frequented for lunch.

Until recently I had never heard that there was another product known as Kellogg's Whole Wheat Biscuit. The Kellogg carton and the name "Kellogg's Whole Wheat Biscuit" would not tell me what sort of product was inside the carton.

RE-DIRECT EXAMINATION.

THE WITNESS: If I saw Defendant's Exhibit No. 6 with the name covered up but the picture visible, I would doubt whether it was Shredded Wheat Biscuit because it is a different picture on there that is unlike the Shredded Wheat picture.

When I hear the expression "shredded wheat" I have in mind just that—that is—that with the Niagara Falls on it—meaning Plaintiff's Exhibit No. 1.

MISS EVELYN LOUGHLIN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am an accountant and reside at 111 East Chicago Avenue, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat Biscuit. I have Shredded Wheat every morning for breakfast and have been eating it since 1920, when the doctor ordered it for me.

When I order Shredded Wheat in restaurants and in stores I always ask for the Shredded Wheat that I am accustomed to having, and I expect to get it. I generally always receive what I ask for, but yesterday there was an exception. I went to the Y. M. C. A. on Chicago Avenue, to the grill, and ordered Shredded Wheat. They brought me Shredded Wheat in a dish, and I ate it; then I asked for another package to take out with me and they brought me this package of Kellogg's. (The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 54.")

Mr. Elson, a salesman of National Biscuit Company, asked me if I would go in and order Shredded Wheat for my breakfast at this particular Y. M. C. A., yesterday morning. He said he would like to know what they were serving as Shredded Wheat. They served the Shredded Wheat to me in a dish—I did not see the carton—so I asked for another carton to take away with me.

CROSS-EXAMINATION.

THE WITNESS: The biscuit served to me were a little harder and a little drier than the Niagara Falls product.

I always notice the picture of Niagara Falls on the Niagara Falls package because I went through the Niagara Falls factory.

If I should learn to prefer Kellogg's product I would say that I wanted Kellogg's Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: Inasmuch as yesterday was the first time I had Kellogg's Whole Wheat Biscuit, I cannot exactly say whether I prefer one or the other. But, as long as I have used National Biscuit's Shredded Wheat so long, I would probably ask for that.

If the grocer sent me the Kellogg product instead of the National Biscuit Company product in an order I had telephoned to him I would send it back and would not expect that mistake to happen again. No woman would expect her regular grocer to send her a brand that she did not want more than once. On the other hand, if I found that, when he sent me this Kellogg brand of shredded wheat, I liked it better than the Niagara Falls product, I would then retain it, and, in the future, I would order it by the Kellogg name.

OSCAR RAYMOND HOLMER.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a distributor of check writers and reside at 1657 Edgewater Avenue, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with Shredded Wheat as far back as I can remember because we have always used it in our home, and I have sold lots of it, too. I was a clerk in a retail store in Chicago, and when a customer asked for Shredded Wheat I always supplied her with Shredded Wheat, meaning Plaintiff's Exhibit No. 17. I never gave customers anything else but Shredded Wheat because I did not know that there was anything that could be substituted for it.

When customers ask for Shredded Wheat they expect to receive Shredded Wheat, the same as when they ask for anything else by its trade name. It is something that they have been using for years and for that reason they will ask for it, if that is what they want.

Yesterday, at one of Raklio's Restaurants, I had my first experience of substitution. I went in there,

and among other things, I ordered Shredded Wheat. I saw the package that the clerk picked up, and it did not look familiar to me. I asked him what it was. I said, "I asked for Shredded Wheat. Don't you have Shredded Wheat?"

He said, "No, we do not." He said, "We carry Kellogg's Whole Wheat Biscuit, which is the same thing." And, of course, I took it.

MR. VILAS:

Q. 25. Did you take the package?

A. Yes.

I also took a printed card which I found on the counter of the restaurant. (The card referred to was received in evidence and was marked "Plaintiff's Exhibit No. 55-A;" and the carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 55-B.")

I stopped in another one of Raklio's Restaurants for a cup of coffee, and I noticed they had shredded wheat on the menu. I asked for a package of Shredded Wheat to take out with me and they gave me another package that was exactly the same as that one there. (I am referring to Exhibit No. 55-B.) I also took away one of the menus with me, on the back of which I wrote exactly what happened in the restaurant. (The menu card referred to was marked "Plaintiff's Exhibit No. 56.")

CROSS-EXAMINATION.

THE WITNESS: The clerk gave me the impression that he did not want me to see the package.

I never noticed Kellogg's advertisement of Shredded Wheat. I have seen Kellogg's Corn Flakes and All-Bran and so forth.

MR. CLARKE:

XQ. 51. Assuming that they were advertised, would you then think that the restaurants would be ashamed to put them on display?

A. It would not be a matter of being ashamed to put them on display. The way I looked at it, the Shredded Wheat people having introduced this product and created a demand for it and spend all that money advertising, and so forth, they certainly should be permitted to sell that product and not have somebody coming along and offering something as a substitution and reaping the benefits of years of advertising that the Shredded Wheat people had been doing.

I knew that after Corn Flakes was well established it ran into a flood of competitive corn flakes, but if a customer asked for Kellogg's Corn Flakes she always received Kellogg's Corn Flakes.

Mr. Arnold, who is connected with The Shredded Wheat Company, asked me to make the purchases and be paid for the products.

At the time I was connected with the grocery business I did not give any thought to the competition directed against Kellogg's Corn Flakes.

Since yesterday I know that there are two different makes of biscuit known as shredded wheat biscuit on the market.

I have always associated Niagara Falls with Shredded Wheat. As a kid, I used to sit—while I was eating breakfast at home—and read all the different things on the outside of the package.

After I had seen the biscuit taken out of the carton in the restaurant I knew right then it was not Shredded Wheat. After I had seen it out of the package, I knew it was made by the Kellogg Company. Judging by the appearance, I thought it looked like Shredded Wheat. I, of course, am used to eating Shredded Wheat in the longer biscuit, and would see the difference in appearance. I did not notice any difference in taste between the Kellogg Shredded Wheat Biscuit and the Niagara Falls biscuit.

From my experience in the grocery trade, it is fair to say that the Kellogg Company is a large advertiser of its various products, and it always had a very high reputation for fair dealing with the grocery trade.

At the time I was in the grocery business the average grocer, was not dealing with the Kellogg people. They were dealing entirely through the jobbers. However, the grocers were always looked after and any goods that were not sold would be returned.

I would say that 50 per cent. of our customers who had asked for the Niagara Falls Shredded Wheat or the Kellogg Shredded Wheat product and who did not want the other product would send it back to the grocer.

During my experience in the grocery trade, the introduction of the new products competitive to old products was handled in the same way as they do today—that is—they usually sent a crew of men around to distribute samples, and gave them an introductory offer when they came into the store. Some of the customers might take advantage of that, and in that way they might break in.

I would not have any idea that this Kellogg package could be handed to any average customer who wanted the Niagara Falls Shredded Wheat, with the thought in the grocer's mind that she would accept this Kellogg's Whole Wheat thinking that that was the package she had been getting all along.

It does not look as if the Kellogg Company were trying to imitate the Niagara Falls product. You would recognize the Kellogg package the same way you would recognize the Shredded Wheat package.

RE-DIRECT EXAMINATION.

THE WITNESS: If the Kellogg biscuit were served to me in a restaurant in the dish, outside of the package, I would immediately think that the Shredded

Wheat people are making⁴ their biscuit into a smaller size.

When I say that there is no effort on the part of the Kellogg Company to deceptively imitate the package, yet I think the biscuit is capable of substitution, independent of the package.

I regard Corn Flakes as purely a descriptive expression like ginger cookies or soda crackers. I do not regard Shredded Wheat in the same category. I know there are several kinds of Corn Flakes on the market. I did not know there was anything, even an imitation of Shredded Wheat, until yesterday.

JOHN FRED MEGGELIN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in the retail grocery business at 1100 South Cuyler Avenue, Oak Park, Illinois. I have been in the grocery business for the past twelve years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat Biscuit. I have been familiar with it ever since I was a young boy and I have handled it since I have been in business.

When a customer asks for shredded wheat I always give her Shredded Wheat Biscuit. That is the only thing I handle (pointing to Plaintiff's Exhibit No. 1).

CROSS-EXAMINATION.

THE WITNESS: The first time I heard of the Kellogg product was about two months ago, when a salesman of the Kellogg Company called at my store. He told me it was a shredded wheat product, but I did not stock it. Since the salesman spoke to me a month or so back, I have known that there were two kinds of

this whole wheat product on the market—one made by the National Biscuit Company of Niagara Falls and one made by Kellogg at Battle Creek.

If a demand were created in my store for Kellogg's Whole Wheat Biscuit, I would stock it.

Kellogg's Whole Wheat Biscuit looks to me like an imitation of National Biscuit Company's Shredded Wheat Biscuit. The physical difference that I see between the two products is that one is shorter than the other.

I buy the Niagara Falls biscuit direct from the National Biscuit Company and the Kellogg's products through the Central Wholesale Groceries. The man at the Central said, "I have a new product coming on the market, and I would like to have you try it."

I said, "I am very sorry, but people know what Shredded Wheat Biscuit is, and they know what the picture is and everything." I said, "I don't care to try to stock two of the same kind of product."

I have never had any trouble with the National Biscuit Company. I was not concerned in any way with the trouble they had with independent grocers some years ago.

Mr. Camphausen, a salesman of National Biscuit Company, asked me to testify about my experience with Shredded Wheat Biscuit.

HARRY E. SCHLOESSER.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer in Chicago, operating four stores.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and have been familiar with it as long as I can remember.

When customers ask for shredded wheat, we supply them with a package like that (pointing to Plaintiff's Exhibit No. 1).

During the period of years I have known the biscuit supplied in cartons similar to Plaintiff's Exhibit No. 1, it has never been altered to my knowledge.

I am not familiar with Kellogg's Whole Wheat Biscuit. It has never been stocked in any of the four stores.

CROSS-EXAMINATION.

THE WITNESS: I was never solicited to buy Kellogg's Whole Wheat Biscuit.

I learned of the Kellogg product through the trade journals.

I have known for two years that I could get Shredded Wheat from at least two manufacturers of cereal goods, although I have never seen the Kellogg product.

Our four stores do not belong to any buying chains or voluntary chains.

I always associate Niagara Falls with Plaintiff's Exhibit No. 1. I have never heard it referred to as the Niagara Falls Shredded Wheat, but I have heard it called National Biscuit Shredded Wheat.

If we found a demand for Kellogg's Whole Wheat Biscuit, we would certainly stock it, although we would not stock it on solicitation. There are so many items coming out and they come out so fast that retailers—and particularly ourselves—find it difficult to have what the people do want and so we try to feed it from the other end—that is—find out what the people want and get the product.

I have from time to time introduced competitive products and in doing that it is customary to describe the advantages that there are for the newer product. I would not say that is like the old product, but cheaper.

in price, because I have not found that very advantageous. My practice is to say that there is a larger content, that it is more for the money, or that the quality is better. In some instances, where I am getting better value for the customer, I regard myself as performing a service to the customer to that extent, in introducing the new product into the trade. We would follow the same procedure if we were introducing Kellogg's Whole Wheat Biscuit.

I would not be willing to say that the Kellogg product was another Shredded Wheat. Shredded Wheat to me is a biscuit, a whole wheat biscuit, in a certain shape. When I go to the restaurant and occasionally ask for Shredded Wheat, that is what I expect to get, and I have always received it. We have served people for twenty-five or thirty years in one or two or three or four locations, and people ask us for shredded wheat and we give them Shredded Wheat. It would be foolish for us to tell them that something else was better or just as good, when they have a different product in mind.

Looking at the Kellogg product, I would say it was Shredded Wheat. Assuming that a customer asked for shredded wheat and I sent the Kellogg product I would expect her to think I was attempting to substitute.

I do not think the Kellogg Company could build up a business by expecting that the grocers would substitute their product for the Niagara Falls package.

If a housewife asked for Shredded Wheat, by which I would assume she meant the Niagara Falls Shredded Wheat, and I sent her one of the Kellogg's packages, her cure for the whole situation would be to send it back. I would not send it to her again. I think the longer grocers are in the business, the less they will want to substitute.

RE-DIRECT EXAMINATION.

THE WITNESS: If I were induced to take the Kellogg's Whole Wheat Biscuit as a line, and a customer called up and asked for shredded wheat, I would send her the product that comes from the factory at Niagara Falls.

I think that what Frigidaire has come to mean to electric refrigerators, Shredded Wheat has come to mean to products of that type—just as a Kodak applies to cameras and Kellogg is a special name for Corn Flakes.

My wife, of course, practices substitution on me sometimes but I eat what is put before me because I have not had any occasion to examine it.

RE-CROSS-EXAMINATION.

THE WITNESS: If I had not seen Kellogg's Whole Wheat Biscuit I would expect to find cookies or crackers in the package instead of Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: If I looked at only the picture on the Kellogg package I would think that Shredded Wheat was in it.


CAROLINE RISTIG.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a bookkeeper and reside at 4318 West Cullerton Street, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have known and used it for ten or twelve years.



When I purchase Shredded Wheat I expect to receive the only Shredded Wheat I have known and which I recognize by the shape of the box and the picture thereon.

Wednesday, of this week, I went into Mr. Prinz's store at 323 Leavitt Street and asked for a box of Shredded Wheat. The woman handed me a substitute and when I asked her why she did not carry Shredded Wheat, she said, "That is the thing."

I said, "Are you sure it is the same?" And she said it was identical.

(The carton was offered in evidence and marked "Plaintiff's Exhibit No. 57.")

The National Biscuit Company salesman filled out the slip of paper pasted on the carton.

CROSS-EXAMINATION.

THE WITNESS: Mr. Petri is the name of the National Biscuit Company salesman who asked me to make this purchase. I am a friend of Mr. and Mrs. Petri, and have been for years.

Mr. Petri did not refund the cost of the package to me—he evidently forgot to do that.

Mr. Prinz's store is not my regular store—Mrs. Petri took me there.

On another occasion I went to a National Tea Store to purchase Shredded Wheat, and they said they were out of it.

The only time I have ever bought or seen the Kellogg product was this one instance that I related. I have never eaten any of the Kellogg product. When the package was handed to me I knew by its appearance that it was not Shredded Wheat. I knew that it was an entirely different package than that which I had had.

MRS. BEATRICE M. KORSEN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I reside at 3224 Beach Avenue, Chicago, Ill. At the present time I am not working, but I was secretary to a lawyer.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been buying and eating it right along.

Wednesday night, at the request of a representative of the National Biscuit Company, I went to the Food Shop located at 4302 North Crawford. Among other things I asked the clerk for Shredded Wheat and he offered me this other package. I noticed it was a different package and asked the clerk if that was what I usually used. He said it was just as good, only the biscuit were a little smaller; the package had 15 biscuit and they charged less—or something like that.

I took the box he offered me and wrote my initials on it. I also filled out the paper that was pasted on the end and gave both to the representative of the National Biscuit Company who told me to go to that store.

(The carton referred to was received in evidence and marked "Plaintiff's Exhibit No. 58.")

CROSS-EXAMINATION.

THE WITNESS: Mr. Damler is the name of the representative of the National Biscuit Company who asked me to go to this particular store. He waited outside for me in a cab while I made the purchase. They did not have National Biscuit Company Shredded Wheat in this store.

I accompanied another representative of the National Biscuit Company, named Mr. Weisselman, to a store in the neighborhood before I made the purchase

at the Food Shop. This was the only experience I had of getting the Kellogg product.

I know now that there are two different manufacturers putting out a shredded wheat product.

MRS. RUTH RACHLIN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife residing at 4423 Sheridan Road, Chicago, Illinois.

I am related, very indirectly, to Mr. Golden, a member of the sales department of National Biscuit Company.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, which I always buy. I have known it for many years because we always used it at home. Every time I buy Shredded Wheat I think of the picture of Niagara Falls on the box.

I do not recall the picture of a dish on the end of the package, marked Plaintiff's Exhibit No. 10.

On December 6th, at Mr. Benz's store, 4101 Potomac Avenue, Chicago, I was given Kellogg's Whole Wheat Biscuit when I asked for Shredded Wheat. When the storekeeper handed me the Kellogg package I knew it was not what I had usually received, but she told me it was just the same as Shredded Wheat. I asked her if it was Shredded Wheat, because I had never had that before, and she told me it was.

The writing on the piece of paper pasted on the package which I purchased is mine.

I could see the ends of the biscuit through the piece of glassine that covers what appears to be a hole in the package, and they resembled Shredded Wheat to me.

If I were to see a package such as that (referring to Defendant's Exhibit No. 6) with the name covered up, and only showing the panel with the picture on it, I would say that the product in that package was Shredded Wheat.

(The carton referred to above was received in evidence and marked "Plaintiff's Exhibit No. 59.")

CROSS-EXAMINATION.

THE WITNESS: Mr. McLean is the name of the man who asked me to make the purchase at that particular store. He told me to take whatever they gave me. I did and turned it over to Mr. Golden, who, in turn, gave it to Mr. McLean.

The store where I purchased the package of Kellogg's Whole Wheat Biscuit is not the one I regularly deal at.

If I were to order shredded wheat over the phone and receive the Kellogg product, I would call the grocer and ask why he made the substitution. If I were to find out that I liked the Kellogg product better than the National Biscuit Company product, I would probably become an adherent to the new product.

I always associate Shredded Wheat with the National Biscuit Company, because that is where the Shredded Wheat I have known comes from.

When the storekeeper handed me the package of Kellogg's Whole Wheat Biscuit I saw right away that it was a different kind of package.

WILLIAM FRANK RITTER.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a printer and reside at 2240 Augusta Boulevard, Chicago, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and have been familiar with it for about eight years.

On December 16th a salesman of the National Biscuit Company asked me to go to a store at 2418 North Halsted Street and purchase a box of Shredded Wheat. They had sold their last box of Shredded Wheat at that store and the man asked me if I would like some other kind of cereal. The girl showed me Kellogg's and told me it was just like Shredded Wheat. I decided to try Kellogg's and had the package wrapped with a bottle of milk which I had also purchased.

I put my initials on the carton and also wrote my initials and the date. (Card received in evidence and marked "Plaintiff's Exhibit 60.")

MRS. BESS GOLDEN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a housewife residing at 4423 Sheridan Road, Chicago, Ill.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with Shredded Wheat all my life, as far as I can remember.

Recently, at the store of T. Benz, on Potomac Avenue, I asked for a package of Shredded Wheat and

the girl brought me this package. (The package referred to was received in evidence and marked "Plaintiff's Exhibit No. 61.") I looked at it and told her that I wanted Shredded Wheat, the package of Niagara Falls. She told me that this was just the same as Shredded Wheat and I took it.

I put my initials on the carton and also wrote the slip of paper which is attached to the carton.

CROSS-EXAMINATION.

THE WITNESS: My husband is with the National Biscuit Company.

GEORGE H. WARREN.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, operating a store at 1000 Beloit Street, Forest Park, Illinois. I have been at this particular store eight years, and in the grocery business twelve years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with it for a good many years—and we have had it in the store as long as I have been there.

I am quite sure Plaintiff's Exhibit No. 10, with the picture of a dish on the end of it, is what I know as Shredded Wheat. It also has a picture of Niagara Falls on the other end. That is the only package I really know as Shredded Wheat.

When a customer asks for Shredded Wheat I supply her with a package like Plaintiff's Exhibit No. 1. To the purchasing public, as I know them, the term "Shredded Wheat" means the product put out by the National Biscuit Company. At one time we carried

another package in the store—I do not remember the shape—but the only one we could sell was the National Biscuit Company package. We had to return the Kellogg biscuit to the wholesale house.

We have quite a little telephone business and when an order comes in for a package of shredded wheat, it is the National Biscuit Company package that is wanted.

If I were carrying the two products today and a customer telephoned for shredded wheat, I would send her the National Biscuit Company product. I regard the words “shredded wheat” as designating the National Biscuit Company product.

I recall that before National Biscuit Company put out Shredded Wheat it was put out by another company, but I do not remember the name of the company. I do know, however, that the shape of the package has not changed at all. It is the same shaped box that always designated Shredded Wheat to me.

CROSS-EXAMINATION.

~~THE~~ WITNESS: I know of no other name than shredded wheat for Plaintiff's Exhibit No. 1.

With the illustration covered on Defendant's Exhibit No. 6, I would think that the name “Whole Wheat Biscuit” meant some by-product of whole wheat, but I really would want to have it opened up before I would decide what was inside of it. But if the package said “Kellogg's Wheat Biscuit” I would expect it to contain the pillow-shaped affair, known to me as Shredded Wheat.

I would be surprised to learn that Defendant's Exhibit No. 6 contained Shredded Wheat Biscuit similar in texture and in shape to the biscuit manufactured by National Biscuit Company. I have never seen the inside of the Kellogg package.

MR. CLARKE:

XQ. 58. I ask you to look at the product inside of that package and say what you would call these.

A. Well, the first impression—

XQ. 59. Suppose you were asked to give a name to—

MR. VILAS: Let him answer. Your first impression?

XQ. 60. Yes, your first impression.

A. Well, it would look to me like someone was doing some copy work. Right off the bat, to see a product which is a seller, and a product that I know, looking at it, to me personally, it looks to me like somebody had done some copying work.

THE WITNESS: In texture it is similar to a Shredded Wheat Biscuit, but I would not call the Kellogg biscuit Shredded Wheat.

In our store the name "Kellogg" is always associated with Corn Flakes.

Mr. McLean, of the National Biscuit Company, asked me to come down here today and testify.

RE-DIRECT EXAMINATION.

THE WITNESS: The biscuit in Plaintiff's Exhibit No. 1 is known to me as whole wheat biscuit. It is known as Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: When the chain store was figuring Plaintiff's Exhibit No. 1 so fine that I could not meet the price I tried to sell the Kellogg product to my customers, but it did not sell.

When I substituted the Kellogg product on telephone orders and the customers returned it, I would not do that again.

LAURENCE SKEWES.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a musician residing at 1511 Walnut Street, Wilmette, Illinois.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. It has been my breakfast food for many years and my mother has eaten nothing but Shredded Wheat for the last three years.

When I ask for Shredded Wheat at the grocery store I expect to receive the package with the picture of Niagara Falls on it, and the building there, which I have been through. When I think of shredded wheat I do not think of any other product. It is quite original with me. I was not aware there was any other like product until a few days ago, when Kellogg's Whole Wheat Biscuit was substituted to me.

At Davie's Lunch, on Forty-seventh Street, Chicago, I asked for Shredded Wheat as it was listed on the menu. Two small biscuit were served to me in a dish. After I had eaten one of the biscuit I discovered it was not the original Shredded Wheat. I purchased another package to take away with me, and I put my initials on it. (The box referred to was received in evidence and marked "Plaintiff's Exhibit No. 62.")

CROSS-EXAMINATION.

THE WITNESS: Mr. Davidson, a salesman of the National Biscuit Company, asked me to go to Davie's Lunch and make the purchase. I recognized right away that the carton was not a Niagara Falls carton.

There was no attempt made to conceal the carton while the biscuit were being placed in a dish.

There was a difference in appearance between the two products. The Kellogg's biscuit was harder baked

and tougher, something that I would not eat as a regular diet. I recognized that I was eating biscuit made of shredded wheat.

Since that experience I know there are two concerns making that product.

BEN ZIEGMUND.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer doing business at 2855 Lincoln Avenue, Chicago, Ill. I have been in the grocery business about twenty years—ten in the retail and ten in the wholesale.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, made at Niagara Falls. That is the original package I have been selling for twenty years. I have been selling that in the retail grocery business and also in the wholesale grocery business.

If someone sends in an order for shredded wheat we supply them with Shredded Wheat, the original package. We do not know anything else. Shredded Wheat has a reputation among the general public. When customers ask for Shredded Wheat they expect to receive the original package coming from Niagara Falls.

I also carry Kellogg's Whole Wheat Biscuit, and when customers ask for the Kellogg product they always receive Kellogg's Whole Wheat Biscuit.

CROSS-EXAMINATION.

THE WITNESS: On one occasion I opened a package of Kellogg's Whole Wheat Biscuit and noticed that it was made up out of the same kind of shreds as Shredded Wheat Biscuit, but I could tell the difference on account of the size.

OSCAR WILLIAM ZUEGEL.

Deposition taken at Chicago, Ill., December, 1932

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer doing business at 725 West Randolph Street, Chicago, Illinois. I have been in the grocery business twenty-eight years—fifteen years in the retail and thirteen years in the wholesale business.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have known Shredded Wheat a long time. When I was a young boy going to business college they had a plant here demonstrating Shredded Wheat and I used to go and watch them make it after school.

In my mind, the Shredded Wheat Biscuit has never been associated with any other product. As far as I have known it, there is only one made at Niagara Falls. When a customer gives me an order for Shredded Wheat I give her a dozen of the product from Niagara Falls.

The picture of the dish with two biscuit in it has always been featured on the Niagara Falls package. It has been a slogan of theirs for years, as I remember it.

If I saw a package like Defendant's Exhibit No. 6, with the name of the product covered and the illustration showing, I would think, from the shape of it, that it was Shredded Wheat.

I have carried Kellogg's Whole Wheat Biscuit, but not during the last several weeks.

CROSS-EXAMINATION.

THE WITNESS: When retail grocers sell the Kellogg product they specify it as Kellogg's Whole Wheat Biscuit.

HENRY J. TEXTOR.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer doing business at 5718 West Madison Street. I have been in the grocery business fourteen years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat and have been familiar with it as long as I have been in business.

When customers ask for Shredded Wheat I give them packages like Plaintiff's Exhibit No. 1. So far as I am familiar with the consuming public, they mean the Niagara Falls product when they ask for Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: We carry Kellogg's Whole Wheat Biscuit at the present time, but I do not know how long we have been carrying that product.

GEORGE M. GOTWALT.

Deposition taken at Chicago, Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I have been associated with the wholesale grocery business for thirty-eight years. During that time I have not only traveled throughout the country, but I have worked in different parts of it in the grocery business, principally wholesale. I organized Butler Brothers grocery department and also worked with Montgomery Ward as a buyer. At the present time I work as buyer for the Thrift Food Stores, which I organized. I have been organizing voluntary organizations for the past few years.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat, the trade name by which it is known throughout the trade. During the course of my experience, I have bought and sold everything that is handled in a grocery, including Shredded Wheat.

I judged the expression "Shredded Wheat" to be wheat made into biscuit form, and that Shredded Wheat was really a coined name. Wheat, of course, is a common word for a cereal, but the two words hooked together always appealed to me as a coined name or word denoting that particular product.

Defendant's Exhibit No. 6 appears to me to be Plaintiff's Exhibit No. 1 in shorter form. The contents of Defendant's Exhibit No. 6 appear to me to be an imitation of Plaintiff's Exhibit No. 1, except as to size.

If I were to see Defendant's Exhibit No. 6 on a shelf with the name of the maker and product obliterated, so as to show just the picture on there, my impression would be that that is about the same kind of a dish that used to be on plaintiff's package.

I would think that the contents of Defendant's Exhibit No. 6 were Shredded Wheat, only Shredded Wheat looks longer than Defendant's Exhibit No. 6.

I recognize Plaintiff's Exhibit No. 10 as one of the first cartons used by The Shredded Wheat Company. It was used for quite some years.

CROSS-EXAMINATION.

THE WITNESS: I have heard of shredded codfish and shredded cocoanut and I would expect to find this type of product in shreds.

I think "Whole Wheat" is a good name for the Kellogg product. Of course, as the Kellogg product is a new one, they would have to use various kinds of publicity in order to tell the public what their product was.

I remember that when Mr. Kellogg put Corn Flakes on the market he gave away many samples. It took quite a while to get the public eating Corn Flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: The public has been educated to know Shredded Wheat, by the people who packaged it and put it on the market, as Niagara Falls. If you stopped a hundred people on the street and asked them what shredded wheat was, they would immediately think of that item there (Plaintiff's Exhibit No. 1).

MR. VILAS:

RDQ. 62. What would you say if a similar product, such as is seen in the Kellogg box there——

A. Yes.

RDQ. 63. —in front of you——

A. Yes.

RDQ. 64. —were put on the market and referred to as Shredded Wheat.

A. I would say it was an imitation, a rank imitation.

RE-CROSS-EXAMINATION.

THE WITNESS: Even if the Kellogg product was listed in big letters as Kellogg's Shredded Wheat, I do not think that would change it any. They would still be using the trade name of the Niagara Falls product.

The biscuit can be in round form or square form or any other form, and you would still use the word "biscuit." But to add the words "shredded wheat" to it seems to me to be an exact copy of the Niagara Falls product.

After all, if I were the man that had built up the Shredded Wheat, I would not want a man coming along and imitating it.

I do not think that other manufacturers should be prevented from making that pillow-shaped biscuit

out of shredded wheat, but I do think that they should be prevented from using that trade name.

I have never handled the Kellogg product. I do not know what business the Kellogg Company has built up in some other part of the country, but I know that it is not common in Chicago.

JAMES A. FENCL.

Deposition taken at Chicago Ill., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a wholesale grocer doing business at 4011 Ogden Avenue, Chicago, Ill. I have been in the wholesale grocery business for twenty years. I carry a full line of standard wholesale groceries, including cereals.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with it ever since I have been in business.

When customers ask for shredded wheat I always give them the Niagara Falls product.

I recognize Plaintiff's Exhibit No. 10—the carton with the picture of a dish on the end—as one of the first cartons used by The Shredded Wheat Company.

I believe Shredded Wheat Biscuit is known generally to the purchasing public because it has been advertised extensively.

When the expression "shredded wheat" is used among consumers and dealers it means the product contained in Plaintiff's Exhibit No. 1.

CROSS-EXAMINATION.

THE WITNESS: I do not know any other name for shredded wheat than Shredded Wheat. However, Shredded Wheat, to me, is a trade name.

I would not have any idea as to the nature of Kellogg's Whole Wheat Biscuit from the name. If I heard there was a product on the market under the name Kellogg's Whole Wheat Biscuit, I would think it was wheat in the form of shreds.

RE-DIRECT EXAMINATION.

THE WITNESS: I think a whole wheat biscuit put out in a shape similar to the shredded wheat in Plaintiff's Exhibit No. 1 would be infringing on the party who started to make the biscuit first.

I repeat that Shredded Wheat is a trade name and that the public understand it as such. When the public want shredded wheat they expect it in that form (Plaintiff's Exhibit No. 1) and they know this trade name. They do not expect anything else in a biscuit like it.

ELMER J. KLEEMANN.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am in business for myself, doing special investigation and collection work for finance companies.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have been familiar with it ever since I have been a child.

To me the expression "shredded wheat" conveys the impression of a product made at Niagara Falls, that comes in a package with a picture of the factory on the front of it, like Plaintiff's Exhibit No. 1.

Last week I went into the Ennis restaurant, which is located on "F" Street, by Seventh, and ordered a portion of Shredded Wheat with bananas. After a

consultation with the counter man, the waitress came to me—I was sitting at the counter—and said, "We do not have any." I said, "You do not have any what?" She said, "Bananas." "Well," I said, "I will take the Shredded Wheat with milk." She went to the rear of the restaurant, behind this same counter, and came back with two biscuit in a bowl of milk; but they neither looked like Shredded Wheat nor tasted like it to me. I asked her what she had served me. She said, "Shredded Wheat."

And I said to her, "This is not Shredded Wheat."

Well, she said, "That is what we always call shredded wheat."

I said, "I would like to see the package."

She said, "Oh, I have thrown the package in the waste-basket."

I said, "Well, I would like to see the package, anyway." So she went back to the kitchen and she came back with a small squarish package that bore the name of Kellogg's Whole Wheat Biscuit. I kept the package there for a while and I tasted the biscuit, and they did not taste like Shredded Wheat. But I had ordered and paid for them, so I ate them, and that is about all there was to it.

MR. VILAS:

Q. 14. Did you finally obtain the carton?

A. Yes, she gave me the carton that she had taken the biscuit from which she had served me.

Q. 15. Have you got it with you?

A. Yes, I have.

(The carton referred to was received in evidence and was marked "Plaintiff's Exhibit No. 63.")

Q. 17. That is all that took place in reference to this shredded wheat transaction?

A. I had just mentioned, casually, that I did not feel that they should serve a product and claim that it was something else, because I did not care for it as much as I did for Shredded Wheat, and I felt that the substitution was totally unwarranted; and, in fact, I rather resented the substitution.

CROSS-EXAMINATION.

THE WITNESS: Mr. R. L. Taylor, who is connected with the National Biscuit Company, asked me to go to Ennis Restaurant and make the purchase. Mr. Taylor is a friend of mine of long standing. He asked me that in the event I was served any substitute for Shredded Wheat, at any time, to get the carton for him.

As soon as the biscuit were served to me in the plate, I recognized right away that they were not the Niagara Falls product.

It seems to me that I had seen or heard that the Kellogg Company was making a wheat biscuit in shredded form.

FREDERICK A. DODGE.

Deposition taken at Washington, D. C., December 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer. I have been associated with the business for the past forty years, thirty-three of which I have been in business for myself.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have handled Shredded Wheat ever since there has been any sale of it in stores in Washington. When I first went into business I do not think I remember Shredded Wheat; but it has become a store name

with us, just the same as anything else. During the time I have known Shredded Wheat there has been no change in the form or appearance of the biscuit—or at least not to any consequence.

When customers ask for shredded wheat I give them a package similar to Plaintiff's Exhibit No. 1. There is no question about shredded wheat having a reputation with the buying public—I think it speaks for itself. During the last twenty years I do not believe I have been without a stock of Shredded Wheat.

I believe the sales of Shredded Wheat have remained constant. I would not say that Shredded Wheat is selling now as well or as much; but that might be due to other cereals. There are so many other cereals coming and going that, of course, it affects the sale of Shredded Wheat. For the last twenty years there has been a steady demand for Shredded Wheat.

The picture of a dish on Plaintiff's Exhibit No. 10 was used by them up until a few years ago. I remember the picture well because I used to buy Shredded Wheat in large quantities. I had to pile the boxes on the shelves and I would place one row with that end out and one row with the other end out—I can remember that well.

I have never handled Kellogg's Whole Wheat Biscuit.

If I were to see a package like Defendant's Exhibit No. 6 standing on a shelf with the name obliterated, I would think it was Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I never saw Kellogg's Whole Wheat Biscuit until a while ago. I recognized them as shredded wheat, but they were much smaller in size than the Niagara Falls product.

RE-DIRECT EXAMINATION.

THE WITNESS: If the Kellogg product and the Niagara Falls product were put on a dish in front of me without any carton, I would say that the Kellogg product was Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: If I saw Defendant's Exhibit No. 6, without the illustration, I would have to open it to determine what was in it. I would not associate that package with the Kellogg product for the simple reason that I remember Mr. Caton, the gentleman who represents the Kellogg organization, giving me a package of flat square biscuit. That was some years ago. I took that package home and we ate it. I remember that distinctly. We sold a few of those—not any great amount—it was Whole Wheat Biscuit as I remember. It was not pillow-shaped like Shredded Wheat—it was a little square and kind of a sweetened biscuit.

GEORGE R. WASHINGTON.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I own and operate a retail grocery store at 229 Upshur Street, N. W., Washington, D. C. I have been in the grocery business for about thirty-three years. My store is known as a Nation Wide Store, a member of a voluntary chain.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat. I have known and been familiar with Shredded Wheat ever since it has been on the market—about thirty-eight or thirty-nine years. I have always sold it at my stores. When customers ask for Shredded

Wheat I give them the product I have always known; I have not had a call for the other one at all.

MR. VILAS:

Q. 21. Would you say whether the expression "shredded wheat" has any meaning to the buying public?

A. Well, I—just—I figure this way: If a person walked in and asked me for a box of shredded wheat, I certainly would give him the original Shredded Wheat,

THE WITNESS: I certainly would not give them the whole wheat package for Shredded Wheat—that is one thing I would not do.

If a customer asked for Kellogg's Shredded Wheat I would ask them which kind they preferred as I was carrying two kinds.

I recognize the dish on the end of Plaintiff's Exhibit No. 10.

CROSS-EXAMINATION.

THE WITNESS: If I had a package like Defendant's Exhibit No. 5 in stock and a customer asked for Kellogg's Shredded Whole Wheat I would give it to them.

LOUIS RICHARD SCHMIDT.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I reside at 602 Gilford Avenue, Hagerstown, Maryland.

I have been familiar with Shredded Wheat all my life as my mother always had it for our breakfast.

If I go into a store and ask for shredded wheat I expect to receive Shredded wheat Biscuit; I mean the product that is made at Niagara Falls.

The other day I went into Fisher's Store, on Salem Avenue, Hagerstown, Maryland, and asked for a package of Shredded Wheat. The man went to the shelf, got me this package (pointing to package) and wrapped it up. I asked for a bill, which he gave me. I put my identification on the package.

(The slip referred to was received in evidence and marked "Plaintiff's Exhibit No. 64"; and the box referred to was received in evidence and marked "Plaintiff's Exhibit No. 65.")

Later in the evening I had a similar experience. I went into Mrs. Dixon's restaurant on North Johnson Street, Hagerstown, and ordered Shredded Wheat. I watched her as she opened the package and put it into a dish for me. After finishing eating this package, I asked her if I could have one to take along and she said, "Sure." She fixed me one to take along, and this is the package. I was seated at the counter and could see the packages as they were in front of me. The bill is attached to the package, with her signature.

I made this purchase at the request of National Biscuit Company.

(The bill referred to was received in evidence and marked "Plaintiff's Exhibit No. 66"; and the box referred to was received in evidence and marked "Plaintiff's Exhibit No. 67.")

CROSS-EXAMINATION.

THE WITNESS: I made these two purchases at the request of Mr. Wyan of the National Biscuit Company. He was with me when I went to Mrs. Dixon's restaurant, but stayed outside. He did not tell where to go when I purchased the package marked Plaintiff's Exhibit No. 67.

On previous occasions, before I knew Mr. Wyan, I have bought Shredded Wheat for my home and always received the Niagara Falls product.

In both of those instances when the Kellogg package was handed to me I recognized at once that it was an entirely different package than I had been buying before.

I did not notice any difference in the size of the biscuit that were served to me in Mrs. Dixon's restaurant as the biscuit were broken up in the dish.

Those are the only two instances of the kind that have ever happened to me.

WILLIAM LAIRD LUDWIG.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I reside at 284 Lincoln Way, West, Chambersburg, Pennsylvania.

I have known Shredded Wheat all my life as it has always been used in our home as a breakfast food.

When I go to the store and ask for shredded wheat I expect to receive that particular biscuit. (Pointing to Shredded Wheat.)

On the 19th of December I went into Martin Brothers Store, in Chambersburg, and asked for a package of Shredded Wheat. He handed me this particular box and I asked him to bill it to me. I have reference to the box with the pencil notations, the slip and the stamp on it. The pencil notations are my identification, the slip is the bill and the stamp is the stamp of the store.

(The bill referred to was received in evidence and was marked "Plaintiff's Exhibit No. 68"; and

the box referred to was received in evidence and was marked "Plaintiff's Exhibit No. 69".)

I had another experience yesterday when I went into Vanderew's Restaurant, in Chambersburg, and asked for an individual serving of Shredded Wheat. The girl handed it to me and I asked her for a bill and she said I would have to get it from the man at the desk in the restaurant. The man happened to be one of the sons that is in business with his father; he gave me the bill and I paid for it and went out. (This is the package and bill I received in that restaurant.) The pencil marks on the box are my handwriting.

(The bill referred to was received in evidence and marked "Plaintiff's Exhibit No. 70"; and the box referred to was received in evidence and marked "Plaintiff's Exhibit No. 71.")

CROSS-EXAMINATION.

THE WITNESS: I did not tell Mr. Vanderew's son what to put on the bill. I asked for a bill for the box of Shredded Wheat and that is the bill he gave me.

Mr. Cowden, one of the National Biscuit Company's men, asked me to make this purchase. Mr. Cowden is a friend of mine. I have known him for some time. He did not talk to me about the case—he asked me as a favor to go in and ask for a box of Shredded Wheat Biscuit.

Mr. Cowden took me with him in his car and he asked me if I would go around and get a box of Shredded Wheat for him. As we were driving around he stopped at a number of different stores. I did not go into these stores—I think he was taking orders as he went in with his order book.

As we reached Martin Brothers' Store I went in first and Mr. Cowden came in after me. I did not

9 speak to him but the man I bought the package from knows that I know him. I do not know why he came into the store.

When we reached Vanderew's Restaurant, I went in alone. I was in there and getting the bill when he came in, went back of the counter and bought something to eat. He was back there about ten minutes.

Mr. Cowden gave me the purchase price of these goods.

I never had any experience before of asking for Shredded Wheat and receiving the Kellogg product.

I have never seen the Kellogg product, only the picture. I did not open the package. According to the picture I would say it was shredded wheat.

ELMER R. JONES.

Deposition taken at Washington, D. C., December, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer located at 3404 Eleventh Street, N. W., Washington, D. C. I have been in the grocery business for about twenty-two years, located at the foregoing address for the last twelve.

I recognize Plaintiff's Exhibit No. 1 as Shredded Wheat Biscuit. I have known it as long as I have been in the grocery business. When my customers ask for shredded wheat I know exactly what they mean—they mean the Shredded Wheat Biscuit that I know, that I have just seen (referring to Plaintiff's Exhibit No. 1).

During my experience with the purchasing public, if a customer or any member of the public asks for shredded wheat, they do not mean anything other than the biscuit in Plaintiff's Exhibit No. 1.

From my experience I would say that the name "shredded wheat" has acquired a reputation among the purchasing public. When the purchasing public ask for Shredded Wheat, they know what they are asking for. How they know is probably not for me to say. It might be probably through advertising purposes, the same as they would ask for a certain brand of canned goods, like the Dei Monte brand. They have probably tried or seen it through the advertisements, or it might be a by-word on their tongue, like when anybody asks for a cracker, they would ask for a package of Unedas.

I am carrying Shredded Wheat at the present time but there were times when I have not carried it. I was not on very friendly terms with the National Biscuit Company and had not bought any products from them for about eight years. At the time National Biscuit Company took over The Shredded Wheat Company, I was under the impression that I could only get it from the National Biscuit Company. At that particular time my jobber happened to be out of it—for what reason I do not know—and he suggested Kellogg's Whole Wheat Biscuit. I did not know anything about that product, but he told me that, as far as he knew, it was practically the same thing; but there were fifteen biscuit to the package.

I thought I would try it, and I put in the Kellogg's Whole Wheat Biscuit. When a customer asked for Shredded Wheat we knew what they wanted and I told them that we were temporarily out of them, but that Kellogg's had a Whole Wheat Biscuit that I thought was the same thing, but there were fifteen biscuit in a package. I sold them the Kellogg's Whole Wheat Biscuit and I continued to sell them for a considerable length of time.

The only comments that I could positively say I had received were that some people liked it because

there were fifteen biscuit in the package and the biscuit were a little smaller than Shredded Wheat; they liked it for that reason. I had one customer who had tried the Kellogg product but who insisted upon Shredded Wheat, and I would go to a neighboring chain store and buy a package of Shredded Wheat to fill that particular order. Outside of that, I do not believe I had to buy a package for anybody, because I suggested the Whole Wheat Biscuit.

I never tried to sell Kellogg's Whole Wheat Biscuit as Shredded Wheat. The customers got in the habit of asking for Shredded Wheat all the time, and we would tell them that they were the Kellogg's Whole Wheat. They said, "Well, that is what I mean. That is all right." And they asked for Kellogg's Whole Wheat Biscuit by the shredded wheat name. I am now carrying Shredded Wheat because in the last two months I am purchasing from the National Biscuit Company.

In my opinion the salability of any product depends entirely upon the method of merchandising and advertising that it is given and the method by which it is sold. In my opinion the considerations or elements that move the public to purchase Kellogg's Whole Wheat Biscuit is probably because of Shredded Wheat being on the market so many years, or probably through advertising or probably because it is a shredded wheat biscuit.

I can also say this: That, in regard to cleansers, people will ask for Old Dutch Cleanser, because, when they think of a cleanser, they think of Old Dutch Cleanser, as a rule.

Now, when they think of shredded wheat biscuit, they think of the Shredded Wheat Biscuit, because they know it is shredded wheat biscuit. They do not know it by any other name. I am not handling Kellogg's Whole Wheat Biscuit now. It is not because I do not

think it is a good product, because I have not given that any consideration at all. But I am not having anybody asking for Kellogg's Whole Wheat Biscuit.

All my customers ask for shredded wheat, and if I did not have Shredded Wheat in today I could sell them the Whole Wheat Biscuit. I do not believe they have any objections to using it.

I have never heard any comment from the trade regarding the reputation of Kellogg's Whole Wheat Biscuit being comparable to that of the Shredded Wheat Biscuit. I have had comments, as I stated before, that some of the trade liked it because it was a smaller biscuit and fifteen in a package, which was probably looking at it from an economy standpoint.

Q. 29. Let me have your opinion as to whether or not, if there had never been such a biscuit as Plaintiff's Exhibit No. 1, and Kellogg's Whole Wheat Biscuit came on the market as it has, whether it could be sold in quantities with the methods that have been so far been used?

A. In my opinion, if there had never been a biscuit made as the Shredded Wheat, I think it would take considerable advertising and a long time in order to promote a big sale.

Now I do not know the quantities sold of either Shredded Wheat or Kellogg's Whole Wheat Biscuit; but I have an idea that there is a great deal of it sold. And I have known Shredded Wheat from, I believe, the time I have been in business—that is, I cannot remember the time when I did not know of Shredded Wheat. And, when Shredded Wheat was spoken of, my idea was just of the biscuit form in which it is made.

Q. 30. Do you think that the presence on the market for so long a period of years that you have known of the Shredded Wheat product has anything to do with the sale of the Kellogg's Whole Wheat Biscuit?

A. In my opinion, I think absolutely that the sale of Shredded Wheat, being on the market the length of time it has, and the popularity it has obtained, has a great deal to do with it.

CROSS-EXAMINATION.

THE WITNESS: There has been no change in the rate of discount given me by the National Biscuit Company that induced me to shift back to them. During the years I refused to deal with the National Biscuit Company I dealt with the Maryland Biscuit Company. A little matter came up that I just do not feel should be disclosed, I got sore at them and I called up the National Biscuit Company and gave them an order. And I have been buying from the National Biscuit Company ever since.

I did not feel that it would be embarrassing and a little difficult to handle the National Biscuit line without buying Shredded Wheat from them because I took it on before I came back with them. I know positively that I have not bought any from the National Biscuit Company since I have been buying back from them; but I have been buying it through my wholesale jobber.

A new product like Kellogg's Whole Wheat Biscuit would have to be suggested by the grocery men in order to sell it. By suggestion, I mean that I would say it was a new shredded wheat product, having fifteen biscuit to the package.

Sometimes customers have a natural curiosity about new products or new kinds of old product and are ready to change, but they have them right before them continuously. A man comes around with a new product that I do not know anything about and I have never heard of it before, and, ninety-nine times out of a hundred, I would not put his product in for the simple reason that I would have to use my own sales effort to put it over, unless it is nationally advertised. A ma-

...rity of the products that I put in that are new are extensively advertised as, for instance, Bisquick—I put it in because it was advertised extensively and people asked for it.

I have known of the Kellogg Company for many years and have always had favorable dealings with them and their products. I know they would always stand behind any product they sold me and that, if it did not sell, they would take it back. These sales methods might make it easier to introduce a new product into the grocery trade, much more so than any other concern you did not know anything about, but you would not use so much sales ability because you have so many articles to sell in the store you would not stop to think of every article you have to sell.

My experience with the Kellogg Company has been that they are wide advertisers. I will state this right here, too: that, when anybody thinks of corn flakes—when I do, and I feel that the public in general do—they think of Kellogg's Corn Flakes. If a customer asked for corn flakes, I would understand her to mean Kellogg's Corn Flakes.

I would not be surprised if you were to tell me that, in certain sections of the country where they have what are known as self-service stores, where Kellogg's Whole Wheat Biscuit is put up on the shelf, a considerable number of customers walk in there and pick that product up. I am not very familiar with that kind of business. I do not know what the attitude of the buying public is to buying in that kind of a store. The majority of my business is a telephone business but I have a lot of store trade, too. I was with the A. & P. Tea Company for many years and as a young boy I managed a store in York, Pennsylvania. I had chain store experience up to the time I went into business for myself. But, as far as a customer picking this up for himself is concerned, I haven't any idea

what the attitude of the public is toward products of any kind. I do know that, in chain stores, where there are different products of the same kind, and where it depends on price, that price tags and prices are a big factor in selling any articles; I do not care what it is.

XQ. 53. And if, in that type of store, the Kellogg product was advantageously displayed and priced, you would expect that people would ask for it on account of those displays?

A. Yes. There are people that would always buy, you understand, a new product, no matter what it is; but I will consciously say that the Whole Wheat Biscuit that was sold in my store was sold through Shredded Wheat, that is, by a customer asking for Shredded Wheat.

I would tell the customer that we had a new product that Kellogg put out, that I understood was just like Shredded Wheat, and asked them to try it. And they tried it under my recommendation.

I think that was a perfectly ethical way for me to sell that product. They asked for Shredded Wheat and I did not have it. We never tell a customer we are out of an article, that is, if we are out of an article and have something else that we substitute for it, we suggest it to them; and, if they won't try it, we tell them we will get the product they want. The reason we do this is that if my customer calls up and orders five or six items from me and she asks for an article that I have not in stock, and if I won't get it for her, she is obliged to go out to some place and buy it. Well, it is my business to keep her away from some other store.

I see nothing improper in my telling customers I was out of Shredded Wheat and suggesting they try Kellogg's Whole Wheat Biscuit. I have the article on sale and if I did not sell it that way it would probably be lying on my shelf yet.

RE-DIRECT EXAMINATION.

THE WITNESS: From my experience with the purchasing public it is my observation that there is a certain class of people who come into stores looking for bargains and looking around for suggestions; but I have found that the general public that go to chain stores buy the specials, and, of course, they buy other things, too. They are close observers of newspaper advertising, particularly.

If a customer in a self-service store or a chain store, having in mind that she needed Shredded Wheat, saw that package there with the picture of the dish on it and two biscuit in the dish (Defendant's Exhibit No. 6) I would think it possible that the customer, or any average customer, would be led to pick up that package thinking it was Shredded Wheat—a lot of them would. I would say that others would ask "Is this the same as Shredded Wheat."

RE-CROSS-EXAMINATION.

THE WITNESS: When I say that customers come into chain stores and ask for specials, I mean advertised specials—they are newspaper ads. By picking up almost any paper you will find that, with their distribution of stores, they can advertise effectively through newspapers because it reaches all sections of the city.

If Kellogg's Whole Wheat Biscuit were featured in the paper, in my opinion, the demand for it would depend entirely on the price at which it was advertised, or how well they knew the product.

I would not say that my customers now recognize the fact that there are two different makes of this pillow-shaped biscuit, this Shredded Wheat, because I have not had anybody, to my knowledge, ask for Kellogg's Whole Wheat Biscuit since I have been out of it. They do not know it by that name. When they

asked for Shredded Wheat I would tell them I was out of it but was carrying Kellogg's Whole Wheat Biscuit and they would say "that's all right."

I do not know of any other name for the product than shredded wheat or shredded wheat biscuit. If a customer came into my store and asked for a package of soda crackers I would not necessarily give them Uneda Biscuit. Many of my customers use the Maryland products and call for "Wynnebrook Soda Crackers." If anybody asked me to describe Shredded Wheat I would say it was a shredded wheat, wheat cut into shreds, and formed into a biscuit. That is what I understand by Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: The name on the Kellogg package is Kellogg's Whole Wheat Biscuit. I do not know what a whole wheat biscuit is. I know that Plaintiff's Exhibit No. 1 contains the pillow-shaped biscuit that we know as Shredded Wheat—we do not know it by any other name. On the bottom of Exhibit No. 1 is the slogan "One hundred per cent whole wheat." I do not think that plaintiff would advertise that slogan unless the product was one hundred per cent. whole wheat.

In my opinion it is fair to say that the product in Plaintiff's Exhibit No. 1 is whole wheat biscuit that is called shredded wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: I would say that the biscuit in Plaintiff's Exhibit No. 5 was a pillow-shaped biscuit. It looks like just what I would call a shredded wheat biscuit, but it does not look as large as the Niagara Falls product.

When I come in here today, Mr. Vilas came outside and talked to me for about two or three minutes.

PAUL R. WATKINS.

Deposition, taken at Washington, D. C., December 20, 1932.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, operating a store connected with the Nation Wide, a voluntary chain organization. I have been in the grocery business seventeen years the twenty-fourth of September. I never was in it before.

I recognize Plaintiff's Exhibit 1. That is Shredded Wheat, the only one I know about. I have known that article fourteen or fifteen years. Being born and raised in the country, I knew nothing about it until I came to the city.

If a customer asked for Shredded Wheat, she would naturally want Shredded Wheat and nothing else. She expects that box right there, Plaintiff's Exhibit 1, with Shredded Wheat on it, the one you just showed me. If you tried to give her anything else, I think she would put up an argument, because she wants nothing else.

When a person speaks or thinks of Shredded Wheat, they have in mind that biscuit right there.

CROSS-EXAMINATION.

THE WITNESS: If she asks for Shredded Wheat, she wants Shredded Wheat. She does not want anything but Shredded Wheat. I mean that box right there, Plaintiff's Exhibit 1. When you go to get it off the shelf, she expects you to bring down a box just like that. There is supposed to be shredded wheat in it, a long pillow, about that long, like bran. I do not know what it is made of. It is a pillow-shaped biscuit. I know nothing about any biscuit of that sort made by Kellogg Company. I never knew any shredded wheat biscuit

except that biscuit, that package. Nobody has ever tried to sell it to me. I would not have bought it if they had; because shredded wheat is Shredded Wheat.

I have handled Kellogg's Corn Flakes and Post Toasties, but no other brand of corn flakes. I had no experience with corn flakes other than Kellogg's. Post Toasties is different.

I talked with Mr. Frank, the National Biscuit Company salesman, who asked me if I would come here today. I did not have time. I asked him what it was. He said something about having a lawsuit and he wanted me to testify about something, that it would be a favor to him. I said all right. He called me a little while ago. I did not know what I was coming down here for, because I had never seen the Kellogg biscuit before I came in here a while ago. Nobody showed it to me. I happened to see it outside. I met somebody in the office. I do not remember who the gentleman was. I guess it was Mr. Savage I talked with. He did not say anything about the case in particular. He said they were trying to sell that for Shredded Wheat Biscuit.

XQ. 36. He said they were trying to sell that Kellogg's biscuit as the Shredded Wheat Biscuit?

A. That is what he said. He asked me if I thought it was fair. I said, "No, I do not think it is fair." I do not think it is fair for another man to come on the market with the exact same shaped biscuit, outside of it is a little tiny bit shorter, that a restaurant can serve for exactly the same thing. I do not think it is fair.

THE WITNESS: He did not open up the package. He did not talk about the case, but simply said the Kellogg Company was trying to sell their shredded wheat biscuit as the National Biscuit product. He did not say anything about its not being fair. I said I did not think it was fair.

RE-DIRECT EXAMINATION.

THE WITNESS: If I wanted shredded wheat, I would naturally buy your Shredded Wheat. I would not buy Kellogg's, because I do not know anything about it. I do not eat it, because I do not eat that brand at all. When you are working hard, it does not stick by you. Sometimes I cannot eat dinner or lunch until one-thirty or after.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not think they have the right to call that shredded wheat. That is not shredded wheat. That is the National Biscuit Company's Shredded Wheat. That is what I think about it. I think they have a trade name, Shredded Wheat; and I do not think there should be another biscuit made that looks anything like it. That is what I think about it.

RXQ. 43. Do you know any other name for shredded wheat biscuit than shredded wheat biscuit?

A. No, that is the only name I think of, as Shredded Wheat.

THE WITNESS: That is the only name anybody can think of. I know very well what Uneeda Biscuit are. It is Uneeda Biscuit. I would say I do not know any other name for it. I do not know that it is a soda cracker. I do not know what is in it. It might have soda or arrow-root in it. If a man in my store asks for Uneeda Biscuit, he gets Uneeda Biscuit, because I think it is the same as that everybody's sausage meat is not alike. Naturally, if they want mine, they will not want somebody's else. Many different people make sausage meat, but all does not have the same things in it. I would be in favor of one person having the sole right to call his product sausage meat. If he is making and putting out one particular kind of sausage meat, I think he should have the right to call it that kind of

sausage meat. If he had it patented, for instance, in a certain package, I think nobody else should be able to make it up in that shape package. As shredded wheat is made in the pillow shape, I do not think anybody else has the right to come along and make that biscuit in that shape. I do not think it is fair.

RE-DIRECT EXAMINATION.

RDQ. 54. I take it from what you say, Mr. Watkins, that you regard shredded wheat as a trade name, do you?

A. That is it exactly. It is Shredded Wheat. You cannot call it anything else.

RE-CROSS-EXAMINATION.

THE WITNESS: Assuming it is a trade name, I could not suggest any other name like soda cracker for Uneeda Biscuit. That is the only thing I know. I do not know what is in it. I do not know what Uneeda Biscuit is, except what you tell me. I have never seen it made. It might be different made from any other biscuit.

I like to be fair. If I have two brands, including my own, I am not fair to my own brand. If we have another brand, I am not fair to them. I am not fair to myself or them. So I feel it is unfair to have two brands of the same product in my store; because I think that is the only brand of shredded wheat you can really buy. I do not know whether there is anything unfair about having two kinds of corn flakes in my store. In one way, I think Post Toasties is not exactly like Corn Flakes. Post Toasties is a thick flake. Corn Flakes are thin. They have an altogether different flavor. Those who like Post Toasties might not even like Corn Flakes. There is a difference. I carry only one kind of ketchup, Heinz's. I would not carry Snider's. If

There are two of the same quality, what is the use of carrying both? A man is crazy to carry Snider's, if this is the only one quality for two. Why should we carry two of the same grade?

I call your Corn Flakes Kellogg's Corn Flakes. When they ask for Post Toasties, they get Post Toasties. When they call for corn flakes, they get Kellogg's.

CHARLES EDWARD JOHNSON.

Deposition taken at Washington, D. C., December 10, 1932.

DIRECT EXAMINATION.

THE WITNESS: I recognize Plaintiff's Exhibit 1, Shredded Wheat, with which I have been familiar for some time. At the request of District Sales Manager Cooper of National Biscuit Company, I visited to-day a restaurant at 33 East North Avenue, Baltimore. I placed an order for Shredded Wheat. I sat at a table. I was served two biscuit in a saucer. I asked the waitress to let me see the package. Plaintiff's Exhibit 72 is the package the waitress brought down to me. I did not see the package before they were served to me. They brought them to me in a dish.

I told her that was not Shredded Wheat. She said, "That is the only kind I know of," and then she brought me the package. Plaintiff's Exhibit 72 is the sales slip the waitress gave me.

CROSS-EXAMINATION.

Mr. Cooper asked me to make the purchase. He took me there and waited outside. He took me to one other place, they served me the National Biscuit Company Shredded Wheat.

FRED A. SCHWARZ.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: My business is retail grocer, at 16 Essex Market, Newark, New Jersey. I have been there fourteen months. It is my own business. My previous connection was with a delicatessen for twenty-two years, in the Public Market in Newark. In the course of my experience I did not have occasion to handle cereals, but I do now. I recognize Plaintiff's Exhibit 1 as Shredded Wheat. I have been familiar with Shredded Wheat about thirty-five years. I have been a user of it in my home. I recognize the contents of Plaintiff's Exhibit 1. I call it Shredded Wheat. During the thirty-five years I have been familiar with the product, the expression shredded wheat has not meant to me anything different from Plaintiff's Exhibit 1 or its contents.

In my own mind, this package is the only shredded wheat I have known of. Being in business at the present time, if a customer asks for shredded wheat, that is my idea of what they want. During the period of time I have been a user of Shredded Wheat, when I went to a store or restaurant and asked for Shredded Wheat or Shredded Wheat Biscuit, I expected to get that item there. In a restaurant, I would not know what they were serving.

Q. 20. Would you say whether or not, in your opinion, the expression shredded wheat has, in the mind of the public, as you know it, any significance as to the origin of the product?

A. From experience, I would say that—my personal experience of the public up to date, this exhibit here expresses the mind of the public as to what shredded wheat means, Plaintiff's Exhibit 1.

Q. 21. What do you say as to whether or not the expression shredded wheat is regarded by the public as a proprietary name or trade-mark?

A. Well, I do feel that it is regarded as a trade-mark name, the same as many other of our cereals, and that people, I do not believe, have any particular knowledge of the process or anything like that. They are interested in a certain package; and I would think that the words shredded wheat would identify this package more than anything else.

CROSS-EXAMINATION.

THE WITNESS: Referring to Plaintiff's Exhibit 1, I recognize the Shredded Wheat Biscuit by the picture itself. I have not heard, or I had not until a few days ago, of any other shredded wheat biscuit besides the Niagara Falls product. Then I heard there was another one on the market, made by Kellogg's. I have not seen it.

RE-DIRECT EXAMINATION.

THE WITNESS: I remember seeing Plaintiff's Exhibit 10 package with the picture of the dish on the end of the package. I cannot say definitely how long that was in use. I believe it has been beyond the fourteen months I have been in the business. I do not remember seeing that picture since I have been in the business. I have seen it prior to the time I was in the grocery business.

If I saw a package like Defendant's Exhibit 6 on a shelf or in such manner that the name was obliterated and I could just see that picture, it would convey to my mind Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: What Shredded Wheat is made of, I do not know. The appearance I do know, and that is

that pillow-shaped biscuit. I would assume, from the use of the word *wheat*, it is made of wheat. I have heard of shredded codfish and shredded coconut. Those products are put up in shredded form.

RE-DIRECT EXAMINATION.

THE WITNESS: I never heard of shredded coconut put up in the form of a pillow-shaped biscuit. Shredded coconut is usually sold in bulk. Shredded codfish is also just in bulk, no particular shape or form, as far as the fish itself is concerned. It is just codfish turned into little shreds.

W. A. DOYLE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am the same Mr. Doyle who testified in Boston. Since that time, I have put in some time in connection with this case. I have had experiences in my investigation. I secured witnesses to come in regard to substitutions and also good competent grocers to testify to their actions in connection with Shredded Wheat. I myself had experience with substitutions. I made four actual purchases in Kalamazoo, Michigan, and two purchases in Battle Creek, Michigan, both substitutions for the original product of Shredded Wheat that I asked for.

On the nineteenth day of December, about 8:30 A. M., I went into the Lull grocery store, 410 East Dutton Street, Kalamazoo, Michigan, and asked for a package of Shredded Wheat. The grocer handed me Plaintiff's Exhibit 74. I replied, "That is not Shredded Wheat." He said, "That is shredded wheat. See the biscuits in the dish?" I took it and went out. I wrote

on the package, so as to identify it. I took the two
scout out of the package and folded it up.

My next call was the same day, about half an hour
later. I went to the Sunshine Grocery Company, 838
Full Street, Kalamazoo, Michigan. I asked the pro-
prietor for a package of Shredded Wheat and was
handed the package, Plaintiff's Exhibit 75. I replied,
"That is not Shredded Wheat." He said, "That is
shredded wheat." Those were his exact words. I had
no further talk, took the package along with me.

On the same day, I went to Red and White
Store, Fred Klopp, proprietor, East North Street,
Kalamazoo, Michigan. I asked for a package of
Shredded Wheat. The proprietor's wife brought me
this package. I protested to her it was not Shredded
Wheat. She said, "It is exactly the same." I said,
"Suppose I take that package home and my wife tells
me I did not get the right thing?" She said, "You
won't have any difficulties that way. That is Shredded
Wheat." Plaintiff's Exhibit 76 is the package I got
there.

On the same day, at the store of Hoover & Barrett,
East Avenue and Gayle Street, Kalamazoo, Michigan,
I asked for a package of Shredded Wheat. The clerk
handed me this package, Plaintiff's Exhibit 77. I re-
plied, "That is not Shredded Wheat." The clerk said,
"That is the shredded wheat we carry."

On December 20, 1932, I went to the store of A. L.
Olmstead, 747 Capitol Avenue, N. E., Battle Creek,
Michigan, and asked for a package of Shredded Wheat.
The clerk brought me Plaintiff's Exhibit 78. I replied,
"That is not Shredded Wheat." The answer was,
"That is shredded wheat."

December 19, 1932, I went to the store of P. L.
Mehan, 456 Capitol Avenue, S. E., Battle Creek, Michi-
gan, and asked for a package of Shredded Wheat. The

clerk handed me Plaintiff's Exhibit 79. I replied, "That is not Shredded Wheat." He said, "Sure, it is shredded wheat."

I also made several other calls in and around Battle Creek. In these particular cases, when I asked for Shredded Wheat, I was asked which shredded wheat I meant, Niagara Falls or the original Shredded Wheat, or Kellogg's. They held up both packages. I made the answer I never knew there were two Shredded Wheats. The clerk replied, "We always like to push our home product." That was on three different occasions that same day, December 20th. I did not make the purchase, because they had both packages. The pencil markings on the tabs of the exhibits just offered were written by me and were memoranda of the conversations, so I would remember just what was said in each case. They were put on there at the time I made the purchases.

CROSS-EXAMINATION.

THE WITNESS: I was in Michigan from Sunday night the eighteenth of December until noontime the following Wednesday. We had a little gathering at Chicago that Friday. I stayed over Saturday and left Sunday for Kalamazoo. The only two stops I made were there and Battle Creek. I have told you all the stores I made inquiry at in Kalamazoo. There was another case, the restaurant in the hotel, New Burdick, a cafeteria, downstairs. I ordered Shredded Wheat one morning for breakfast. The girl passed out just a dish with two biscuit in it. I told her I would like to have it in the original package. She said they did not serve it that way but just in the dish. They had the small biscuit of shredded wheat. I recognized them as Kellogg's biscuit, as far as I could judge by the shape. I know they were not our biscuit. I knew right away they were not National Biscuit Company's Shredded Wheat.

Mr. Vilas and Mr. Savage instructed me to go to Kalamazoo and Battle Creek. They did not ask me to go to any other towns. I went alone. I went to the agency manager in Kalamazoo. He gave me a list of the stores to go to. That was so, also, in Battle Creek, I went to all the stores on his list. I did not go to other stores; but there was no list at all in Kalamazoo. He drove me to the stores, and I went in myself. He did not come in at all. He selected the stores I was to go to. Being a stranger, I thought that would be possibly the easiest way. He wrote a list of stores I was to go to in Battle Creek. He and his wife drove me to Battle Creek. Then I came to New York. They did not take me to the cafeteria at the New Burdick Hotel. I was stopping there. I looked the hotel up in the regular hotel catalogs. I am not familiar with it in any shape or manner. I met the local representative of the company at the agency in Kalamazoo.

At some of the stores I told them I did not know there were two kinds of shredded wheat until then. I still do not know it. I just made that statement, not meaning that that created in my mind that there were two kinds, because it did not. I did not mean to say I did not know about the Kellogg product or that I did not think it was made of wheat or that I thought it was made of rye or anything else than wheat. I do not know anything about the process of making the Kellogg biscuit. I have seen the shredded wheat made at Niagara Falls. I am sure I know nothing about Kellogg making it. My conversation in the stores was I did not know there was any other kind of shredded wheat except the Niagara Falls.

RE-DIRECT EXAMINATION.

THE WITNESS: In the hotel where I had breakfast, I did not notice where the waitress got the biscuit. All

the cereals were in little individual dishes. It was cafeteria style and you helped yourself. They were all set up. There were no packages visible. They had Kellogg's other cereals in some little individual packages there, but the biscuit were out of the package.

The stores where I made the purchases did not also have Shredded Wheat. Some of the other places I visited had both kinds.

RE-CROSS-EXAMINATION.

THE WITNESS: When I asked the restaurant girl for the package, she just said they were not served in the individual packages. I imagine she meant they took them out of the packages before they were served. She did not exactly say that. I presume she meant that, because all the other cereals were in the original package. I just asked her if I could have the original carton they were in. That is all I had to say. Her answer was that that was the only way they were served. I did not pursue the matter further.

RE-DIRECT EXAMINATION.

THE WITNESS: I had no reason to infer that the biscuit served to me were taken either from an individual package or a large package. I did not even take them. I knew from the size of it that it was not shredded wheat. They were not just what I wanted, and I did not bother taking them.

There was more than one dish on the counter of the cafeteria. They run them in rows. There were probably three rows of dishes with the biscuit in them and three rows of other cereals, quite a display there. I think I am correct in saying there were three dishes with biscuit in them.

RE-CROSS-EXAMINATION.

THE WITNESS: I do not know how restaurants are serviced. I am not familiar with that particular end of it. In my travels around the territory, I have seen the individual packages of Kellogg's Whole Wheat Biscuit in various parts of the country, and in restaurants, stacked up on the counters. The restaurant in Kalamazoo is the only instance I have known of in which these biscuit were served in that particular way. That is the only one I visited myself.

RE-DIRECT EXAMINATION.

That is the only one I visited in Kalamazoo at that particular time. In my travels, I have observed the Kellogg biscuit in various other places set off in dishes without the package, frequently. I have noticed a number of different cases where they have not displayed the package at all. It is usually just two biscuit in a saucer. I remember in Chicago a particular case of that kind, where they did not have individual packages. They served it out of the package that way. It was not a cafeteria but a regular lunch room. The packages were under the counter. When I asked to see the package it came from, they showed it to me.

I think in Raklio's restaurant in Chicago they had biscuit displayed just the same as in the New Burdick. I am almost sure that is the place.

RE-CROSS-EXAMINATION.

THE WITNESS: In Chicago they were not displayed in the plates. She took them out from under the counter and put them in a dish. They were not up on display. I had no conversation with her as to why she was using the big package instead of the individuals. That is my particular experience. That is the only one I recall now. As far as my experience has been,

it is safe to say that both the National Biscuit Company and the Kellogg Company apparently endeavor to push the sale of their product to the restaurant trade in the small packages, especially the Kellogg Company, because, in almost every case, you get it in the individual size.

TRUMAN A. DEWEESE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: 247 Park Avenue is my city address. I live in Scarsdale now. That has been my address since I was at Niagara Falls with Shredded Wheat. Until recently, I have been connected with the Shredded Wheat Company or with the National Biscuit Company as director of publicity, controlling all promotion work except sampling.

I was on the staff of the *Chicago Times Herald*, later the *Chicago Herald*, as an editorial writer. Having started my education as a physician, I was much interested in foods and dietetics. I used to do some writing for a magazine *What to Eat*, in our building and finally became the editor of it on the side, retaining my other editorial work. I once wrote an editorial there on white flour, taking the Government's analysis and showing that, by the modern roller process, they were throwing away the best part of the wheat grain. That editorial came to the attention of Mr. Perky, in Niagara Falls, who was evidently a subscriber to *What to Eat*. He wrote me, somewhere about 1904. In his letter he complimented me on the editorial and said he considered it very brave of me to write and publish such an editorial, that he was very much interested in that kind of work, the work he was doing,

making a whole wheat product, and he would be glad to see me sometime. I answered him. To make a long story short, he came to Chicago and telephoned me to see him at the Auditorium Hotel, which I did. He told me how he came to invent Shredded Wheat, and that my editorial had interested him very much. He asked me if, the next time I came to New York, I would stop off at Niagara Falls and see the Shredded Wheat plant. I said I would. In the meantime, I sent him suggestions for Shredded Wheat advertising, as I was already familiar with the product. I wrote two or three articles for him, one on domestic science, which he signed and paid me for. My name did not appear in connection with it in any way.

A short time after, I stopped off at Niagara Falls, visited the plant, ate Shredded Wheat, visited Mr. Perky, and stayed all night with him. He lived right across the road from the factory at that time. I went back to Chicago with my work.

In the meantime, he told Mr. Rankine and Mr. Porter, officials of Shredded Wheat Company about me. He was an eccentric fellow and got into a great many arguments with them. They were the financial men, and they would not do all he wanted them to do. He said, "There is only one man who really understands all about Shredded Wheat. His name is DeWeese, and he lives over in Chicago." A little while after that, I was made director of special publicity for the World's Fair at St. Louis. I resigned my job in Chicago, went down there, and put through my little plan of publicity which had been adopted by the Board down there as one of the most feasible and practical of the plans to get publicity for the exhibition.

In the meantime, I received a telegram from Mr. Rankine, of the Board, who was New York Commissioner and at that time a big financial man in the

Shredded Wheat Company. They were evidently trying to get it away from Mr. Perky and reorganize it, form a stock company, issue bonds, and so on. I met him down there and had lunch with him. Then and there, I made a contract with him to go to the Shredded Wheat Company immediately after the Fair closed, which I think was December 31, 1904, because I went with the Shredded Wheat Company the following year, 1905. I may be off a year there. At that time, it was called the Natural Food Company. Mr. Rankine told me: "Mr. Perky says you are the only chap who really understands shredded wheat. I want you to take care of the promotional end of it." Mr. Perky had left them about a month before that, I believe.

When I went to Niagara Falls, I immediately assumed duties in charge of promotional advertising and was in full charge of that branch of the business from then on, except the sampling. I did not have much to do with that. At first, the promotional work was largely demonstration. That had been Mr. Perky's idea of advertising, to show the biscuit to people, how to use it, and how it was made. That demonstration was to show the culinary uses of the biscuit. Mr. Perky had the idea that Shredded Wheat was a food to be combined with other foods, like creamed vegetables, meats, and so on. However, after being there awhile, I began to shape the advertising in a different direction, toward its being a breakfast cereal or food, retaining a good many of the more popular combinations with fruit and other things it combined well with, to carry out this demonstration idea, which we continued in a small way for a while.

He had some young women graduates of Oread Institute, a domestic science school he bought and founded in Worcester, Massachusetts, where the first factory was operated. They were kept in an apartment building in New York; and their job was to go

out and give luncheons in private homes and show the uses of Shredded Wheat. For instance, if a woman wanted to give a luncheon to repay her social indebtedness, she would allow these girls to come in. They would take hold of the luncheon and serve shredded wheat in a great many combinations, like creamed oysters, and such as that.

The other demonstration idea was carried out in the factory, where they took thousands of visitors through every year. They saw the process, were served Shredded Wheat generally in a simple way, with sliced bananas, or something like that. The average number of visitors per year was about a hundred thousand. Sometimes it was a hundred and twenty-five thousand or more. That continued all the time.

The demonstration idea was carried out in a more complete and extended way in what we call the mechanical exhibit, which was continued many years after Mr. Perky left. They were simply miniature Shredded Wheat factories, set up in different stores in cities and towns, where we installed the actual machinery and made Shredded Wheat Biscuit, serving it to the crowd, with a lecture on Shredded Wheat. Those were operated in all the large cities at different times of the year. We had one very extensive one in Atlantic City during the summer. One of the first was at One Hundred and Twenty-fifth Street in New York, visited by Mr. Darius Mills at one time. He became infatuated with Shredded Wheat, began eating it, and finally became the principal stockholder of Shredded Wheat Company, acquiring 51 per cent. of the stock, including a good deal of Mr. Perky's when he left. The idea was we could not take everybody through the factory, so we took the factory to them. We operated miniature factories in different parts of the country. Those were attended by thousands of visitors who

were served Shredded Wheat. It was a part of the demonstration plan, advertising Shredded Wheat.

That series of demonstrations lasted, I would say, roughly, fifteen years. They were finally abandoned as we began to get into national advertising. We realized Shredded Wheat was getting a distribution making it necessary to do a far-reaching style of advertising. We abandoned the demonstrations by the young ladies, closed up their apartments, sold out the furniture, and stopped the mechanical exhibits, or abandoned them for the time being; but we continued putting little shredders in windows of grocery stores and restaurants, instead of putting in the full exhibit. They started that fifteen-year period of demonstration about 1905 when I first went there.

One of our earliest forms of advertising was the lantern lecture, entitled "Wonders of Niagara," consisting of motion pictures, devoted half to Niagara Falls and half to Shredded Wheat. The idea was to use Niagara Falls to draw the crowd. After that, we would lead them into the Shredded Wheat factory. From there on, they were pictures of the process of making Shredded Wheat. They were shown in all the larger cities, wherever we could get into a church or Y. M. C. A., and so on. We would furnish the lantern, the lecturer, and the pictures free. We allowed the society or church to charge an admission of twenty-five cents or whatever they chose. That was done generally throughout the country, continuing for about ten years after I went with them. They were finally abandoned as expensive and reaching so few people at a time. It carried out Mr. Perky's idea of using Niagara Falls to attract attention to Shredded Wheat Biscuit. As we began to abandon these forms of demonstration, we began to advertise more extensively in magazines and newspapers, black-and-white publicity. In 1910, our newspaper advertising became nationwide.

Until then, it had been local where we were working a town. By 1910, we were, I think, in all leading newspapers in the different cities and towns of the United States, Canada, and Great Britain. I wrote the copy in those days.

When I first went there, I think they were in some few magazines. Mr. Parky had been. We continued in magazines very extensively, until 1910, when we began to drift out of magazines into newspapers, feeling that we had a larger distribution there which fitted a little more into our work. For instance, where we were sampling, having special sales, or a mechanical exhibit, the newspaper in that town could do local advertising for it in that city, which could not be done in a magazine.

The earliest magazine advertisements were lithographed inserts, showing Shredded Wheat with strawberries and other fruit, in colors. We drifted later into black-and-white advertising and had many full pages in *Saturday Evening Post*, *Leslie's*, *Collier's*, and so on. The Associated Sunday Magazine was a weekly Sunday supplement of many newspapers, probably twenty-five or thirty leading papers. We took full pages in that, sometimes back covers. We were in all the leading magazines of those days, *Munsey's*, *Harper's*, *Scribners*, *Century*, and *World's Work*, that type. We drifted out of them into newspapers I think about 1915.

The distribution of Shredded Wheat was getting to be very general about that time, 1910, 1912, along there, when we went into the newspapers, for the reason that it reached a larger number of cities and towns more intensively than we could in the magazines. Finally, we went out of the magazines for a long while, retaining back covers or full pages in a good many weekly magazines, and began spending four or five hundred thousand a year in the newspapers. We got

a lot of free advertising. It used to be my job to write news articles, which the newspapers would print, as long as we advertised in them. They were educational articles. In fact, all our advertising was of an educational nature. As a guess, I should say we advertised in fifteen hundred newspapers at that time. Our expenditures in them were from three to five hundred thousand a year, depending upon the appropriation. Several times, it ran up to seven hundred thousand a year. In this advertising, we continued to emphasize Niagara Falls and associate it with Shredded Wheat. We hardly ever printed an advertisement without mentioning Niagara Falls. When the other factories were built, we put them all in the advertising. We would feature Niagara Falls as the home of Shredded Wheat, and then we would mention the other factories, across the river in Niagara Falls, Canada; Oakland, California, and one in England.

I had been there but a few years when I suggested the change of name from Natural Food Company to Shredded Wheat Company, because we were losing so much advertising in the words *Natural Food Company* whereas, if we changed it, we would get advertising every time the corporation's name was mentioned. We had the name changed over the entrance from Natural Food Conservatory to Home of Shredded Wheat, cut in stone over the arch, and we began using that as the corporate name. That was long after Mr. Perky left. He would not have stood for that.

We were in street-car advertising very extensively in the larger cities and in elevated stations and subways for at least ten or fifteen years in the early part of the promotion; but, when we got into newspapers extensively, we got out of street-car advertising for a while. We used street-car advertising in New York City, Philadelphia, Brooklyn, Boston, Chicago, cities of that type; more extensively, of course, in New York,

where we went into subways and elevated stations. We had what we called single-sheet posters in all those places, in colors. We took those street-car cards, after they had been used, framed them, and put them in restaurants and grocery stores. They were all in colors, mostly illustrating the fruit combinations.

We got up a great many booklets under various titles, distributing them by the million all over the United States and Canada; by our sales agents in sampling campaigns, and many of them by mail in response to answers to advertisements, carried in many of the magazines, with an invitation for them to send to us for these booklets. Many of our sales agents were largely samplers. They took a State, organized it for sampling, and went right through from one end to the other. As our product went to the wholesaler and jobber, there was little else for them to do but distribute samples throughout the United States, from house to house. Everywhere they handed in a sample, one of those booklets went. The booklets were usually published in lots of one to five million. Some of them were called:

More Light; The Vital Question Cook Book; A Family Affair; Of Vital Interest to Mothers; Shreds of Life; For Old and Young; Come and See Us Make Shredded Wheat; A Way to Save; More Life; An Easy Road to Health; Shredded Wheat Dishes, a cookbook; Life and Health; The Bread of Health; Wonders of Niagara; Make It Your War Bread, gotten out during the World War; A Happy Way to Health; Health From the Whole Wheat; Fifty Ways to Serve Shredded Wheat. I wrote all those booklets except More Light, the Vital Question Cook Book, and A Family Affair, which were written by Mr. Perky before I went with the company. I wrote: Health in Every Shred. I will add to that: Ask Your Doctor, a special booklet used in a campaign with doctors.

These booklets all described the process of making Shredded Wheat and gave its nutritive food value, the reasons for the process, making whole wheat grain digestible, the different popular and easy ways of serving it. They were given out by our samplers, and we gave them to visitors at the Home of Shredded Wheat, Niagara Falls, and in many other ways, all of which I cannot recall now.

Our biggest distribution of literature, perhaps, was our four-page leaflets, printed, I think, in ten-million lots; a leaflet devoted to Shredded Wheat and showing some of the culinary uses of it. For many years they were handed in the doors with samples, with a cook booklet, also.

We furnished Shredded Wheat menu cards to restaurants free of charge, with the biscuit in a dish at the top, with strawberries, perhaps, or fruit of some kind, depending on the season we gave them to the restaurants. They were used by restaurants quite extensively in cities and towns all over this country and Canada. I figure we had used, up to 1926, twenty million of those.

In addition to the leaflets and menus, we supplied restaurants with a glass globe, filled with Shredded Wheat Biscuit, to put in the window, like Plaintiff's Exhibit 36. They would not all take them; but, where they would, we gave them. They put them in a show window or on the counter. That began about ten years after I came with them. I do not know exactly the number distributed, but it was considerable. Every once in a while, Mr. Meek, the purchasing agent, would order so many thousand globes from a glass concern. Biscuit were not served out of those globes. They were supposed to be refilled from time to time, but the restaurant men neglected it. I think you will find a lot of those globes still around in stores and restaurants. We had no other glass containers that I know of, used by restaurants in serving biscuit.

Our store advertising consisted of lithographed cut-outs for windows, such as picture of a woman serving a child Shredded Wheat Biscuit, and other forms which were set off in the window in the form of an easel, generally two or three feet high and two or three feet wide. Sometimes they were strips pasted on the sides of windows, with biscuit falling out of a carton, and all sorts of pictures we had the grocers put in the windows, wherever they could be persuaded to use them. Our agents would start right in at one end of the State and carry it right through to the other, with a certain number of cut-outs in a wagon or automobile, putting them in stores wherever we could induce them to put them up. We also used what we called street-car cards or hangers, to hang up in the stores, in colors, showing various uses of Shredded Wheat; with strawberries, in the strawberry season. In November or December, we would show sliced peaches; in winter, always sliced bananas. That was done very extensively throughout the United States and Canada.

We issued blotters by the millions. They were given with samples at certain times of the year, always a lady's blotter, that she could use with her secretary, with a picture of Shredded Wheat and an invitation to visit the factory if they came to Niagara Falls. To say we used easily a hundred million blotters would be well within the truth.

Post cards were used in the foyer of the factory at Niagara Falls. Visitors would sit down at the desks in the foyer of the factory there and write home on them. Sometimes I would get out postcards that had a message something like this: "We have just gone through this Home of Shredded Wheat . . . and eaten the biscuit, and it was delicious. Wish you were here," leaving a place for them to sign.

We had school charts, dimensions about two by two and a half feet, illustrating the process of making

Shredded Wheat from the whole grain. It started at the top with a view of a wheat field or farm, then a reaper reaping the wheat, then a threshing machine, then on down to its coming to the Shredded Wheat factory and being made into Shredded Wheat Biscuit, all illustrated; then a number of dishes printed on it, the food value of whole wheat, embracing a chemical analysis of Shredded Wheat, showing the two were just alike, very little difference: the analyses of whole wheat and Shredded Wheat. That was in the center of the school chart. They were sent to public school teachers all over the country, who would hang them on the wall to demonstrate the food value of whole wheat, and, incidentally, how Shredded Wheat, being a whole-wheat product, was made.

That was done in considerable quantity. We started in selling them at ten cents apiece, and we finally sent them free to anybody who could ask for them. When a teacher got one, she spoke to another teacher who would write in for it. If our samplers would go past a schoolhouse, they would go in and leave a school chart.

Quite a feature I originated when I was there consisted in getting up various contests. First, there was a recipe contest, where we advertised through magazines and newspapers cash prizes of thirty-five hundred dollars to women who would send in their favorite ways of serving Shredded Wheat, what they thought was the best way for serving it. Those prizes were awarded by judges selected at Niagara Falls, domestic science teachers and two others. I think we must have gotten about a half million recipes, at a conservative estimate, which had to be looked through by the company. One woman sent in a roll of a thousand all written on brown butcher's paper. Finally, we sifted fifty of the best ones out. There were a great many repetitions. The woman who wrote them on brown paper had

made up a lot of fanciful combinations not practical at all. We did not select them. We selected fifty, which were published in a little booklet, entitled: Fifty Ways of Serving Shredded Wheat.

The next contest was an essay contest, where we invited school children to write essays on Shredded Wheat. For the best twenty essays, we brought twenty pupils, each with a teacher, to Niagara Falls and entertained them for two days at the expense of Shredded Wheat Company, showing them all the sights in the Niagara Falls region, putting them up at the finest hotel, in Niagara. Each pupil had to be accompanied by his or her teacher. We did that twice, in two successive years; took pictures of the pupils and their teachers. I estimate we had about half a million essays on Shredded Wheat from these two contests in 1926 and 1927.

We had special campaigns. One of our booklets, entitled Building Better Babies, was sent to the mother of a baby about a week or two after the baby was born. We got the names through boards of health in different cities and towns, furnished to us through a firm in Chicago which made a business of gathering them. Two weeks after the baby was born, we sent that mother this booklet and a letter, calling her attention to the fact that, if perhaps, the baby could not digest mother's milk or did not have it and could not digest cow's milk, Shredded Wheat baby food had saved thousands of babies. That was a special campaign, kept up all around the year, every year, the whole year continuously.

We carried special advertising in trade papers, that appealed to our retailers. I always took the position that Shredded Wheat was a consumer and not a trade proposition, that we had to sell it before it went on the shelves, and all the grocer had to do was to hand it out when it was called for. So we did not value trade

papers very highly; but we did it as a matter of trade policy; always with some special talk to the grocer.

In all the various kinds of advertising I have been describing, Shredded Wheat was pictured as the product. The advertising was all built around Shredded Wheat. I always figured we were selling not whole wheat but the process of making a whole-wheat grain digestible. That is what we had to get across, and that is how I came to originate that slogan, "It's All In The Shreds." I figured that came pretty near telling our story. We featured it in magazines and newspapers for a good many years and ran it on the cartons. It is on Plaintiff's Exhibit 10.

I see also on that exhibit the picture of a dish with two biscuit in it. About 1908, I went to Mr. Porter, then vice-president, and suggested that hardly anybody was satisfied with one biscuit to a serving, that it had been my experience that people ate two biscuit. I always ate two in my home, and why should we not change all our advertising to show two biscuit in a dish instead of one. Prior to that we had always had one biscuit in a dish. Mr. Porter did not see any objection to it. It looked like a good scheme for doubling the consumption of Shredded Wheat. We always advertised, after that time, about 1908, two biscuit in a dish as a proper serving, on the carton, and, after that, in the advertising. The two-biscuit picture has continued up to this time.

The bundle of papers, entitled Summary of Advertising and Promotional Work during the period from 1895 to July 31, 1927, consists of data made up under my direction. They must be substantially correct, because they were taken from the records of the company. The last few sheets contain a list of a number of publications, which I recall are publications in which advertisements of Shredded Wheat appeared. This was a newspaper schedule for one particular year, typical or illustrative of the wide range of our newspaper ad-

vertising and the kind of papers we used in different cities and towns. Plaintiff's Exhibit 83 is the schedule.

I remained with the Shredded Wheat Company from along in 1904 or 1905, when I assumed the position of advertising manager, at about twenty-five years, or up to the time the National Biscuit Company took over our business. Then, through an arrangement with Mr. Tomlinson and Mr. Grossmore, and others of the National Biscuit Company, I went with Frank Presbrey Company, an advertising agency which had handled this advertising with the National Biscuit Company for a number of years. I understood I was to continue with handling the advertising of Shredded Wheat. That lasted until the present year. I retired during the year 1932. Sickness took me to a hospital for an operation and many months in a sanitarium. During that time, another agency came in and got the advertising. Anyway, I retired.

Plaintiff's Exhibit 84, a compilation consisting of several typewritten sheets pasted together, entitled Advertising and Promotional Expense in the United States, Canada and England, was made up from records of the company kept under my supervision. It shows, for the years indicated, from 1895, including 1926, the expenditures of the Shredded Wheat Company for advertising of various kinds, as set forth in the exhibit. Those figures are taken from the records of the company, and I think they must be correct.

The effect of this continual advertising of Shredded Wheat upon the expression *shredded wheat* was to make it a sort of household word, as if you would speak of starch or potatoes, as differentiated or distinguished from proprietary foods, like Grape-Nuts, or Mello-Wheat, or any of those foods in those days. You would not expect to find any of them mentioned in any book on dietetics, for instances, or in a book by a physician; but they mentioned Shredded

Wheat as if it were a commonly accepted well-known name of a food. For instance, Walter Page, in his books giving his experiences during the World War, mentioned Shredded Wheat in one of them. He said that, if his shredded wheat lasted, he would get through all right. There were references like that in a great many books, where they would not think of mentioning any other proprietary article.

Plaintiff's Exhibit 85, now shown me, is the extract from Walter Page's book I referred to where he mentions Shredded Wheat, being a letter from Walter H. Page to his son, dated London, April 7, 1918, copied from the Life and Letters of Walter H. Page, Volume II, page 369.

Plaintiff's Exhibit 86 is a list I prepared, after reading books on dietetics and other subjects, of references to shredded wheat.

MR. BYRNE: I am willing the record should show that, in the book from which Plaintiff's Exhibit 85 is copied, the words *shredded wheat* are not printed with capital initials; whereas, on Plaintiff's Exhibit 86, in respect to the same book, the expression *Shredded Wheat* has capital initials.

THE WITNESS: I recognize the dozen or more books on the table beside me as albums containing records of Shredded Wheat advertising. I kept Plaintiff's Exhibits 87 to 112, inclusive, as part of my official records, these albums, containing tear sheets and other samples of advertising used by the company. They are records which were in my office, kept under my direction.

The dates on the samples contained in these various volumes, either printed or written, are the correct dates upon which those ads respectively appeared. Some of the books, for example, Plaintiff's Exhibit 87,

contain newspaper clippings of a date prior to the time I went with the Shredded Wheat Company, beginning with, for instance, December, 1900. That volume and other similar volumes on this list of exhibits were in my custody during the twenty-five years I was at Niagara Falls, as part of the records of the Shredded Wheat Company. I identify and recognize these volumes as such. I have seen them before. This was all publicity given to Mr. Perky when he went to the Falls and started to build this factory.

(The witness was temporarily withdrawn and resumed the stand the following day, January 5, 1933.)

THE WITNESS: The three volumes marked Plaintiff's Exhibits 2, 3 and 4, for identification, purporting to contain samples of cartons, are familiar to me. The cartons contained in these books are samples of cartons used from time to time by Shredded Wheat Company. I do not think I could give you the dates of them. I know they are the Shredded Wheat cartons in use from time to time, and the carton on page 38 in Plaintiff's Exhibit 4 for identification was changed to two biscuit about 1908. I would say this carton was probably used prior to 1908. I made changes from time to time, in different years, in the phraseology of this reading matter on the back of the carton. The carton was substantially the same until we changed it and had the two biscuit here.

Cartons such as the one appearing on page 24a were used very early in the game, just as I was taking over the advertising of the Niagara Falls. We got the goddess Ceres off the carton, and Niagara Falls was substituted. She also appeared on the wooden cases.

The cartons in the back part of Plaintiff's Exhibit 4 for Identification, marked volume one, were some of

the oldest cartons in use, before I went with them. On page 2d is 1903. I should say that is probably correct. I saw some of those cartons when I was there. I do not know just how long they were used.

There is one of the Cereal Machine Company, Worcester, Massachusetts. Perk's idea was he would make more money out of selling cereal machines, like coffee grinders. Noting in volume two, Plaintiff's Exhibit 3 for Identification, page 44, a carton bearing a copyright legend 1911, I should say that would tend to fix in my mind the probable date of use of that carton. There is only one biscuit in the dish. To 1909, I think, we were using one biscuit in a dish.

The Chinese package on page 56 of Volume Two was used for export. That carton on the other page represents the same thing, copyrighted in 1916, Canadian Shredded Wheat Company.

On page 19 of Plaintiff's Exhibit 2 for Identification, marked volume three, there is an English carton containing two biscuit, which was subsequent to ours. That is carton number 134 on page 19, and there is a copyright date, 1911. I would think it was about 1910. On pages 16 and 17 of the same book are cartons, 1926. We began with the two biscuit a long time before that.

(The books, "Plaintiff's Exhibits 2, 3 and 4 for Identification," were received in evidence.)

CROSS-EXAMINATION.

THE WITNESS: On copy of trade-mark registration No. 52858, of the Natural Food Company, registered May 22, 1906, I recognize the picture of the woman as what I call the goddess Ceres that appeared on the cartons of the Natural Food Company, described as follows: "The trade-mark consists of the representation of the mythological character Ceres, represented

as holding a lighted torch in one hand and a sheaf of wheat in the other.' I have seen that lady on some of the cartons of the plaintiff's predecessors, and on the wooden cases.

I identify the Ceres woman as being on both ends of number one carton in book number one, marked Cereal Machine Company, office and factory fifty-three to sixty-nine Jackson Street, Worcester, Massachusetts. Underneath her are the words *trade mark*, shown on both ends of the carton.

Mr. Perky's first idea was to sell the little shredding machines that looked a great deal like coffee mills to the housewife and let her do her own shredding of the wheat, so she would shred the wheat in her own home. He thought there was more money in making the machine than the biscuit. I think that only lasted a year or so.

The same Ceres trade-mark appears on the second carton in the book, at both ends of the carton. The product is referred to on one face of the carton as Shredded Whole Wheat Biscuit, and on the other as Shredded Wheat Biscuit.

On the carton appearing on page 2a, marked in pencil 1901 and 1902, the name of the manufacturer is The Natural Food Co., and the Ceres woman still appears, marked *trade mark*, on both ends of the carton. On this carton, the name of the manufacturer, the Natural Food Co., Niagara Falls, New York, is succeeded by the words Successors to the Shredded Wheat Co. On this carton, the product is referred to in several places as Shredded Whole Wheat. The plaintiff's biscuit shown on this carton is considerably different from the biscuit as it now appears. It is the split biscuit. One of Mr. Perky's favorite ideas for serving Shredded Wheat was to run a knife through, split the biscuit, and toast it.

The Ceres woman still appears on both ends of the following carton, on page 2b, marked noticeably with the words *trade mark*.

It is also true of the carton appearing on page 2c, marked 1901, that the Ceres woman appears on both ends of the carton.

On page 2d there is a carton marked 1903, in which the Ceres woman appears only on one end of the carton and the words *Shredded Whole Wheat* on the other end. On the front and back panels of this carton, the product is referred to as Shredded Wheat. On the bottom, when the flaps are folded, it would appear as Shredded Whole Wheat. The phrase *Shredded Whole Wheat* has taken the place of the Ceres woman on one end of the carton. This is a carton of Natural Food Co., still marked Successor to the Shredded Wheat Co., Niagara Falls, New York.

The part on page 3, marked 1903, is generally similar to the next preceding carton. The Ceres woman appears on one end of the carton, and the words *Shredded Whole Wheat* are on the other end. I would say that the words *trade mark* on this Ceres woman end of the carton were very much smaller from the ones in the inscription *trade mark* on the earlier cartons.

These 1903 cartons appearing on pages 2b and 3 contain a rather prominent notice on top, reading:

"September 17, 1895, PATENTED October 15, 1895," and an inscription, reading: "This food, the process of making it, and the machinery used in the manufacture, are under the protection of the United States Government, by virtue of nineteen patents of recent dates. Patents have also been taken in the principal foreign countries. The Natural Food Co. Successor of the Shredded Wheat Co., Niagara Falls, New York."

The next carton, on page 4, marked 1903 in pencil, is generally similar to the immediately preceding car-

tions, the Ceres woman appearing on one end and *Shredded Whole Wheat* on the other. The manufacturer's name is still "The Natural Food Co., successor to the Shredded Wheat Company, Niagara Falls, New York." Mr. Perky was rather fond of the name Natural Food Co. and held on to it until we finally changed. We did not know at the time that it was ever the Shredded Wheat Co. I did not know they had ever used that prior to that time.

The carton appearing on pages 5-6 is a sample carton, marked *free sample*. On one side of the sample carton is the Ceres woman, beneath her being the words *Manufactured by The Natural Food Co., Niagara Falls, New York*. On the other side of the carton is *Free Sample of Shredded Wheat*. Judging by the size of the carton, I would say it held at least two biscuit. It looks like a very narrow carton, compared with the individual cartons used later on. The carton at the right of the page is marked *Offices: Six & Eight Eastcheap, London, E. C.*, evidently for use in the English trade. The carton at the left contains under the picture of the Ceres woman the words "Manufactured by The Natural Food Co., successor to the Shredded Wheat Co., Niagara Falls, New York."

On the following carton, on page 6 of volume one, is marked in pencil "In 1905." I saw a picture of this carton some years after that, when we took off the picture of the goddess Ceres. They were using it when I went there. The carton shows the goddess Ceres on one end and the words *Shredded Whole Wheat* on the other end. At the top of the one panel are the words *Directions for using Shredded Wheat*: "Place biscuit in oven to renew crispness. Consists of the entire wheat grain (nothing added) made light and short by mechanical shredding and thorough cooking." Under that: "Keep the teeth and mouth in order, as a

natural food, by exciting proper and complete action in the natural way." That follows out the idea of the corporate name, Natural Food Co. That was Mr. Pérky's idea.

Referring to the individual carton appearing on the pages marked 8-8 and 9-9, these two individuals are marked in pencil, the left-hand one, December 17, 1904, to July 25, 1905. That coincides with my recollection of the use of that carton, the two-biscuit sampler. It seems to be a little thicker individual carton than the ones we last referred to; also containing the name The Natural Food Co., successors to The Shredded Wheat Co., Niagara Falls, New York, the picture of Ceres on one end, and the words Shredded Whole Wheat on the other end, also the inscription on the top as to the product being patented.

The carton on page 10 contains Ceres on one end and the Shredded Whole Wheat inscription on the other, and, under Ceres, "Manufactured by the Canadian Shredded Wheat Co., Ltd., Niagara Falls, Ontario, made in Canada." I recall the use of that carton by the Canadian Company around that time. That was about the time I went with them.

On the carton 10-a, marked 4/8/05, the picture of Ceres is on one end, above her, the phrase Shredded Whole Wheat, and under her, the phrase The Natural Food Co., Successor to the Shredded Wheat Co., Niagara Falls, New York. The inscription under Ceres has become very small now. On the carton, above the words *Whole Wheat* and under the word *Shredded*, appears the word rather prominently in brackets, *trade mark*. The words *Shredded* and *Whole Wheat* are more prominent than *trade mark*. This marks the time when the printing ink on the carton was changed from black to purple, about that time, 4/8/05, trying to make the carton more attractive without destroying the orig-

inal design. This is the first carton on which the words *trade mark* have been associated with the word *Shredded*. The immediately preceding cartons on pages 7 to 4, contain the expression *Shredded Whole Wheat* but not the words *trade mark* under the word *Shredded*, as in carton 10-a.

The carton on page 11 is a very old one, marked in pencil *after April 8, 1905*, which looks as if it had been used from April, 1905, to April 22, 1908. It is printed in black ink and still carries the manufacturer's name as The Natural Food Co., successor to The Shredded Wheat Co., Niagara Falls, New York. It is fair to say that the words *trade mark* under the word *Shredded* on one end of the carton is several times as noticeable and prominent as the words *trade mark* have now become under the Ceres woman on the other end of the carton. This carton apparently used up to 1908, still contains the explanatory phrase "Consists of the entire wheat grain (nothing added) made light and short by mechanical shredding and thorough cooking."

The carton on page 12, marked April 30, 1907, appears to be a sample. It is marked *Sample*. It is a complimentary sample. On the end is *Shredded (trade mark) Whole Wheat*. It appears to be the first use of the phrase "It's All In The Shreds." It refers on the bottom to the product as *Shredded Whole Wheat* and on the front and back panels as *Shredded Wheat*. On one end panel, the only language used is: *Shredded (trade mark) Whole Wheat. "It's All In the Shreds."* On the other end panel are the words *Shredded Whole Wheat*, and under that the picture of Ceres and the phrase "Manufactured by the Natural Food Co., successor to the Shredded Wheat Co., Niagara Falls, New York."

The carton on page 12-a contains the notation March 5, 1906, and is printed in purple ink. We ex-

perimented with a lot of cartons. It is more blue than purple. It is generally similar to the previous carton, containing picture of Ceres on one end and Shredded (trade mark) Whole Wheat. It's All in The Shreds, on the other end.

Carton number 15 is a generally similar carton, marked for Canadian Shredded Wheat Co., Ltd.

Carton 16 on page 16 contains the notation July, 1907, is in blue ink, and generally follows the description of the last carton, having the words Shredded (trade mark) Whole Wheat It's All In The Shreds on one end, and the words Shredded Whole Wheat, the picture of Ceres, the small inscription trade mark under her, and the words The Natural Food Co., Successor To The Shredded Wheat Co., Niagara Falls, New York; and, on the bottom, the words: Shredded Whole Wheat. Open At The Opposite End. This 1907 carton still contains the phrase: Consists Of The Entire Wheat Grain (nothing added) Made Light And Short by Mechanical Shredding and Thorough Cooking.

Carton 16-a is the same type of carton, except it is a sampling carton, marked on the top: "Complimentary Sample." It still carries the Ceres picture, marked as a trade mark on one end, and on the other end, Shredded (trade mark) Whole Wheat. It's All In The Shreds.

Carton 17 is a carton of the Canadian Shredded Wheat Co., Ltd., of Niagara Falls, Ontario, marked "To January 1, 1909, Folding Box Co.," a full-sized carton, marked "Made In Canada." On one end it has the words "Shredded Whole Wheat," Ceres, marked trade mark, and the words "Manufactured by Canadian Shredded Wheat Co., Ltd., Niagara Falls, Ontario, Made In Canada." On the other end appear the words: Made In Canada. Shredded (trade mark)

Whole Wheat "It's All In the Shreds." Made in Canada. You will notice that these are folding cartons, instead of cartons with the strips pasted on.

Carton 18 is the same kind of carton we have just described, but made for The Natural Food Co., Successor To The Shredded Wheat Co., Niagara Falls, New York, and marked in pencil: Started running January 3, 1907. It contains Ceres marked as a trade mark on one end, and the words: Shredded (trade mark) Whole Wheat. "It's All In The Shreds" on the other end.

Carton 18-a is marked in pencil 11/5/07, and in pencil at the upper left-hand corner: "Reg." It also contains Ceres as a trade mark on one end and the words Shredded (trade mark) Whole Wheat. "It's All In The Shreds" on the other end. The Natural Food Co. still appears on the carton as Successor to The Shredded Wheat Co., Niagara Falls, New York. The carton contains on the top the patent notice previously referred to.

Carton 19 has a pencil inscription below it 4/22/08, and contains on the top a certain list of patents, dates, and numbers; the words "Patented, September 17, 1895, October 15, 1895. This Food, The Process of Making It, The Special Machinery for Its Manufacture, are Under The Protection of The United States Government By Virtue Of Many Patents, as follows:" (57 numbers follow.) The carton still carries Ceres, marked with the very small words *trade mark* on one end, and, on the other end, the words Shredded (trade mark) Whole Wheat. It's All In The Shreds.

The reason for the slogan "It's All In The Shreds" was that those five words seemed to embody everything there was to say about that whole wheat; It's All In The Shreds meaning that the whole wheat grain, all the whole wheat grain was in the shreds;

and then the other meaning conveyed was that the virtue of the product was in the shredding process, you see. So we meant to have those five words convey all there was to say about Shredded Wheat.

The following printed matter appears on the carton:

On the front face: "Guaranteed under the Food and Drugs Act June 30, 1908, Serial Number 6579;

" 'TELL ME WHAT YOU EAT AND I WILL TELL
YOU WHAT YOU ARE'

"Fine White Flour Products, such as Bread, Biscuit, Buns, Rolls, Doughnuts, Cookies, Crackers, Cakes, Pies, etc., are unnatural and impoverished food; and in the process of making, and serving, other heat-making products, such as Butter, Lard, and Sugar are largely used, forming a one-sided diet. Those who live on this so-called 'Staff of Life' have Weak Muscles, Weak Stomachs, Poor Digestion, Poor Nerves, Bad Teeth, and Poor Health generally.

SHREDDED WHEAT

contains all the elements of the Whole Wheat—a Perfect Food—and is made Light and Short without Yeast, Baking Powder, Soda, Saleratus, Cream of Tartar, Alum, or other foreign substances, and without the use of Salt Raising, Lard, Butter, Cottolene, Cotton-seed Oil, Oleomargarine, or other Greasy Materials, or substitutes therefor. It is a Fresh Food and is Free from all animal life. The thoroughly washed and cleansed Whole Wheat Grain goes into the hopper of the shredding machine and comes out Light and Short, without being touched by human hands.

"THE SHREDDED WHEAT COMPANY HEREBY GUARANTEES that Shredded Whole Wheat Biscuit and Tris-

cuit contain the entire wheat grain (nothing added), made light and short by thorough cooking and mechanical shredding. The Shredded Wheat Company hereby agrees to save all dealers who sell said goods harmless from all penalties under the Pure Food Laws, State and National, by reason of selling said products, —The Shredded Wheat Company.

THE SHREDDED WHEAT COMPANY
Formerly THE NATURAL FOOD CO.

NIAGARA FALLS, N. Y., U. S. A.

London Agency

THE SHREDDED WHEAT COMPANY

10 EASTCHEAP, LONDON, E. C.

Open at Opposite End SHREDDED OPEN AT OPPOSITE
END."

On each side: "PLACE BISCUIT IN OVEN TO RENEW
CRISPNESS."

On the rear face: "Guaranteed under the Food
and Drugs Act June 30, 1906, Serial Number 6579."

DIRECTIONS FOR USING SHREDDED WHEAT.

PLACE BISCUIT IN OVEN TO RENEW CRISPNESS

"Consists of the ENTIRE WHEAT GRAIN (nothing added) made light and short by mechanical shredding and thorough cooking.

"Combines with the necessary bulk, all the food properties requisite for thorough nourishment.

"Easily digested—but not 'predigested.'

"Especially beneficial for those who suffer from indigestion, constipation, and kindred complaints.

"Promotes thorough mastication, as required in the digestion of all food, especially cereals.

"Keeps the teeth and mouth in order as a natural food should, by exciting proper and complete action in the natural way.

**COOK BOOK OF RECIPES
FOR SHREDDED WHEAT MAILED FREE**

"May be eaten with butter, fruit, syrup, jelly, milk, etc., or in a sandwich form, with meat, eggs, or cheese. As a breakfast cereal, moistened with milk, hot or cold, it cannot be surpassed. Made without salt, it may be seasoned to taste. For milk or cream toast the shredded wheat is most desirable. Being especially porous and absorbent, it forms for dishes made of jellies, blanc mange, creams, or other semi-liquid substances, a foundation of highly-nutritious and pleasant character. Opened and prepared with layers of berries, slices of juicy fruits or sauces, the shredded whole wheat forms a palatable and nutritious combination.

"With a layer of cheese between the halves and toasted, so that the cheese permeates the shreds, an excellent lunch dish is made.

"All cooked vegetables which have a flavored liquor, or are of moist character, such as spinach, peas, tomatoes, cauliflower, parsnips, etc., can be served therewith to marked advantage, as it will take up the flavor and liquor without becoming mushy and soggy.

"Baskets can be made by cutting a cavity in the top, which can be filled with minced meats, juicy vegetables, berries, mushrooms, cooked clams, oysters, etc. thereby forming attractive dishes.

AWARDED GOLD MEDAL, PARIS, 1900."

On one end: "SHREDDED

(Trade Mark)

WHOLE

WHOLE"

"IT'S ALL THE SHREDS"

On the other end is: "SHREDDED WHOLE WHEAT
(Picture of Goddess Ceres)
Manufactured By
THE SHREDDED WHEAT CO.
Formerly THE NATURAL FOOD CO.
NIAGARA FALLS, N. Y."

I also recall the use of the following words

"THE SHREDDED WHEAT COMPANY HEREBY GUARAN-
TEES that Shredded Whole Wheat Biscuit and Triscuit
contain the entire Wheat Grain (nothing added), made
light and short by thorough cooking and mechanical
shredding. The Shredded Wheat Company hereby
agrees to save all dealers who sell said goods harmless
from all penalties under the Pure Food Laws, State
and National, by reason of selling said products.—The
Shredded Wheat Company" on cartons at that time.
Apparently, this carton 4/22/08, is the first so far in
which the company name is the Shredded Wheat Co.,
marked as formerly The Natural Food Co., Niagara
Falls, N. Y., U. S. A. I think that was used about that
time, in 1908.

Carton 19a is a sample carton, marked on the top
Complimentary Sample, and containing, on one face:
"Directions For Using Shredded Wheat: Place Biscuit
In Oven To Renew Crispness. Consists of the ENTIRE
WHEAT GRAIN (nothing added), made light and short
by mechanical shredding and thorough cooking." It
also contains on one end the words Shredded Whole
Wheat, below that a picture of Ceres, and, under that
the little phrase *trade mark*, and then the words Manu-
factured By the Shredded Wheat Co., Niagara
Falls, New York; and, on the other end, the words:
Shredded (trade mark) and a picture of a plate con-
taining a spoon and one biscuit; below the plate the
word Wheat, and below that the phrase It's All In

The Shreds. This is the first carton which we found that contains the picture of the biscuit in the dish steam cooked. This carton still carries the picture of of the Ceres woman and the phrase on one face "Consists of the ENTIRE WHEAT GRAIN (nothing added), made light and short by mechanical shredding and thorough cooking." On the end opposite Ceres, it contains the words Shredded (trade mark) and, below that, a picture of a plate with one Shredded Wheat Biscuit in it, under that Wheat, and below that It's All In The Shreds.

The large carton 20 seems to differ from previous cartons only in having the lock end, with the notations of all patents on one flap of the carton instead of two.

I remember carton 20-a, in which the panel on one end has the words Shredded Whole Wheat, and the picture of Ceres; on the other end, Shredded, under that in brackets trade mark, and under that the words Whole Wheat, and under that It's All In The Shreds.

I also remember carton 21, Complimentary Sample, the two-biscuit sampler, containing Ceres on one end and the single biscuit in a plate on the other, marked from 6/30/08 to 1/6/09. According to that carton, up to January 6, 1909, they were still using the goddess Ceres on one end and the words Consists of the ENTIRE WHEAT GRAIN (nothing added), made light and short by mechanical shredding and thorough cooking."

Carton 22 seems to be the same type of carton, without change, using Ceres on one end and the words Shredded (trade mark) Wheat, It's All In The Shreds on the other end, with the picture of a single-biscuit plate and spoon.

On page 22-a, there are cartons marked 22-a and 22-b. This is a complimentary sample carton, containing on one end a picture of Ceres with the words Shredded Whole Wheat, and, on the other end, Shredded (trade mark) Wheat, It's All In The Shreds,

with a picture of a single-biscuit plate and a spoon; marked 5/28/10. I remember a carton like that being used. It also contains the statement Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking; shredding, and baking. Carton 22-b is the first carton in this book which carries a picture of the factory on one face. My recollection is that the picture of The Home of Shredded Wheat first came on the cartons about 1910.

Carton 23 is a large-sized carton carrying a picture of the plant on one face and How to Serve Shredded Wheat on the other; Ceres on one end, and a picture of the single-biscuit plate on the other end, with the words: Shredded Wheat and It's All In The Shreds.

Carton 24, dated 8/8/10, is the same type of carton, also carrying the picture of a food factory, "The Home of Shredded Wheat" on one face, and Ceres on one end, and the words Shredded (trade mark) Wheat, It's All In The Shreds, with the picture of the single-biscuit plate on the other end. It also contains the phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking; shredding, and baking; and the carton also carries various patent numbers. The first sentence there is different. The phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking, has been slightly changed over some of the previous cartons. That change has been in there for several cartons.

Carton 24-a is a complimentary sample carrying a picture of the food factory on one face, the goddess Ceres on one end, and the words: Shredded (trade mark) Wheat. "It's All In The Shreds," with the picture of the plate and one biscuit in between the words *trade mark* and the word *wheat*, on the other end.

Carton 25 is the same general type of carton as the last one referred to, October 31, 1910.

Cartons 26 and 27 are Complimentary Sample cartons. I recall the use of those cartons at about that time, October 31, 1910. Carton 26, the one on the left of the sheet with no picture of the factory, is a Canadian carton. Carton 27 carries a picture of the plant, the Home of Shredded Wheat, on one face, and a picture of Ceres on one end. They are two-biscuit sample cartons.

Carton 28 is apparently the first carton we have come across shown in colors. There is no notation of a date. I cannot recall just when that change was made. I should say it was somewhere near 1915 they began to use a carton printed in several colors as shown on page 28 of volume one: red, black, and blue. The carton still carries the phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking. The plate of biscuit, on one end, still carries one biscuit.

Cartons marked 29, 30, 31, 32, and 33 are of the same general type as 28, with Ceres on one end, shown in blue and red, marked as a trade mark, Manufactured by The Shredded Wheat Co., Niagara Falls, New York. My best recollection is that these cartons were used somewhere near 1915.

Carton 34 is marked 1911 and carries a picture of Niagara Falls on one end and the Shredded Wheat plate on the other end. I recall the use of that carton. The reading matter on one end of the carton is: Shredded (trade mark)—then a space and the plate with the biscuit and spoon—then the phrase: Copyright 1911 by The Shredded Wheat Co.; then, in large red letters under that: Wheat. It's All In The Shreds. That is the first carton on which we find the words: Copyright 1911 by The Shredded Wheat Co., and the first carton on which we find, in place of Ceres, a pic-

ture of the Home of Shredded Wheat with a picture of Niagara Falls, I think. I thought the introduction of colors came a little later. I might be wrong. That is 1911. Possibly whoever made up this scrap book might be mistaken. It seems to me the full colors, red, blue, black, and green, came after that. I think the Falls took the place of Ceres. When she was taken off, she was not used again, except there may have been a stock on hand to be used. When the supply of old Ceres cartons was exhausted, nothing but the Niagara Falls picture was used. Mr. Perky's idea in building the factory at the Falls was advertising, to cash in on the fame of Niagara Falls, which was visited by a million or so people every year. He wanted to identify and connect up the Shredded Wheat factory with Niagara Falls. So, beginning at least as early as 1911, Niagara Falls was put on one end of the carton and has been kept there ever since. Since that time, Niagara Falls has been strongly associated with that package of Shredded Wheat. It was carried even after the other factories were built, and it was still referred to as Niagara Falls Shredded Wheat.

Carton 35 is a Complimentary Sample, generally similar to the preceding carton. The picture of Niagara Falls has displaced Ceres.

Carton 36, marked 1911, is generally similar to the last carton and contains, under the picture of the factory, the words, "The Cleanest, Finest, Most Hygienic Food Factory in the World," and "Copyright, 1911, by The Shredded Wheat Co." On one end of the carton there is a picture of Niagara Falls, with the words: The Home of Shredded Wheat, Niagara Falls, N. Y. On the other end are the words: Shredded Wheat with berries or other fruits in season, with a picture of one biscuit in a plate, covered with strawberries. Those were used in the strawberry season. It still carries the

phrase: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking. It also contains the phrase: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I remember putting on, also, the line: The only breakfast food made in biscuit form. I do not know just what date that was.

According to carton 37, that same form of package was apparently used through 1912. I remember that carton, which appears to have been marked Copyrighted 1911, but it is dated in the book 1912, carrying generally the phrases just read for carton 36.

Carton 38, also marked: Copyrighted 1911 by The Shredded Wheat Co., has gone back and contains the plate with the single biscuit, without any strawberries. They used the strawberry carton in the strawberry season and the one without any berries the rest of the year. They tried to use some of those during the spring only, but they overlapped. It depended on how fast the grocer moved them. We might have some strawberry cartons in December, always figuring they had an advertising value, no matter when they were used.

I remember the Complimentary Sample carton 39, marked February 2, 1912, which is apparently another one of the thin or flat sample cartons, with the Niagara Falls picture on one end and the words: Shredded (trade mark) Wheat. It's All In The Shreds on the other end. From around 1911, the cartons were, as I recall, continuously printed in two or three colors.

Carton 40 is about the same type of carton as we have just discussed, and so is carton 41, except it is a Canadian carton, showing a picture of the Canadian plant instead of the Niagara Falls plant; I guess, the first one of the Canadian factory.

Carton 42 is a Canadian carton similar to 41, except the plaintiff's Shredded Wheat is shown with strawberries on the biscuit.

Carton 43 is the same general type, but it is American, showing strawberries on one end, and The Home of Shredded Wheat and a picture of Niagara Falls on the other end.

Referring to Plaintiff's Exhibit 3, volume two, carton 44, is the same general type, carrying a picture of the plant on one face, Niagara Falls on one end, a picture of the plate with one biscuit on the other end, and a series of patent numbers on the bottom.

Carton 45, marked 1913, is the same general type, printed in colors, with the Niagara Falls picture on one end, a plate with one biscuit on the other, the factory on one face, the other face containing, among others, the phrases: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I recall the use of that carton in 1913. It is marked 9/25/13.

Carton 46 has on it the phrase, written: This carton in use January, 1915. It is still colored, containing the picture of plate with one biscuit on one end and a picture of Niagara Falls, with: The Home of Shredded Wheat on the other; and the factory on the other face, the words Shredded Whole Wheat on the top. This carton still carries the two phrases: Shredded Wheat is Made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I recall the use of that carton about that time.

Carton 47 is the same general type of carton, marked for Canadian Shredded Wheat Co., and containing the picture of the Canadian plant.

Carton 48 is an individual carton of the same general type, carrying the same general matter, a reproduction of the large carton.

Carton 49 is an American Complimentary Sample, marked in use January, 1915, of the same general type of carton as I have just described.

Carton 50 is the Canadian carton in use about that time, complimentary sample. These were single biscuit samples. There were two kinds of carton, one thin, holding one biscuit; the other a double carton, holding two biscuit. Where the ends of the carton show just about the thickness of a one biscuit, they are single-biscuit cartons. Where the end panel is double that thickness, it is a two-biscuit carton.

Cartons 51 and 52 are United States and Canadian complimentary sample cartons of the same general character. They are used in sampling, but those are individuals the way they are served in hotels. They were made, I think, as individuals for sale, of the same general type of carton as the samples but not marked so. Carton 52, dated April 13, 1915, still carries on one face the phrase: Shredded Wheat is Made of Whole Wheat and is made digestible by steam cooking, shredding, and baking; also the phrase: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food; and, on one end, It's All In The Shreds.

Going back to carton 51, it contains on one face a picture of the factory, and on the opposite face: Individual Shredded Wheat for use in hotels and restaurants; and: Wholesome, nourishing, and satisfying for any meal. To serve the biscuit, pour hot or cold milk over it, add a little cream, then salt or sweeten to suit taste; and: Being in "little loaf" form, shredded wheat makes wholesome combinations with berries, sliced bananas, sliced peaches, prunes, baked apples, or other fruits. Cover the biscuit with the fruit, then pour

milk or cream over it, and sweeten to suit the taste. I recall the use of that carton, marked: First run, February, 1915.

Carton 53 is a large-sized carton containing those same phrases and also carrying the phrase on the end: It's All In The Shreds.

Carton 54 is the same type of carton, containing a Chinese label pasted to it. I do not recall just how it was fixed. I suppose the Chinese label is a translation of that reading matter. Whether it was finally printed on a carton I do not know. I think the Chinese trade did not justify printing a carton for it, so they just printed the label. It is my recollection that the package began to go into the Chinese market in some small quantity about that time. I composed the reading matter on carton 54 under the heading: How to Use Shredded Wheat. It took the place of what was originally on the carton, simplified, more understandable and direct. I thought it would help in the sale of the food to tell them it was made of whole wheat, made more digestible by steam cooking, shredding, and baking, and so forth. We continued to use those phrases in all our advertising, so I had them put on our cartons. I think they are still using them. I may have made a few little changes in them in the last few years I was there. I think this was used almost continuously after I changed the carton.

Those cartons run generally in the same character through 56, a complimentary sample with a Chinese label, and 57 and 58.

Carton 59, individual service of Shredded Wheat, a Canadian carton, is in a little different form. I do not remember why that was changed. It is for restaurants in Canada, a white carton, printed in black ink, containing no picture of the factory or of Niagara Falls. I am afraid I cannot recall when it was used. The picture just shows one biscuit in the plate in attempted natural

colors. The carton was for two biscuit. It says, "This package contains two biscuit." The front face contains: This package contains two shredded wheat biscuit.

Carton 62 is the same type of black-and-white individual or sample carton.

Carton 63 is a one-biscuit sample carton, with the picture of the factory on the front face, reading matter on the back, a picture of Niagara Falls on one end, and the single-biscuit plate on the other end.

Carton 64 is again a colored carton, also 65 and 66. I never could quite agree on the use of the word *biscuits*. I have always used the word in the plural, *biscuits*. The carton manufacturer always used the word *biscuit*, no matter how many were in there. In all my advertising I made it *biscuits*.

Carton 68, Canadian, is the first carton containing on one end the reading matter: Net Weight of Contents twelve ounces, Shredded (trade mark), a picture of a single-biscuit plate, the phrase: Copyrighted, 1911, by The Shredded Wheat Co., and then the large word *Wheat*, then the phrase: Twelve Biscuit, and, underneath that: It's All In The Shreds. I am not really positive why the reference was put on to twelve biscuit; but it seems to me it happened when some other attempts were made to manufacture Shredded Wheat Biscuit in cartons containing a different number. We put that on to make certain they knew there were twelve biscuits in there. That was a reaction to some form of competition, as far as I recollect.

Carton 69, marked 11/23/16, the Pacific Coast carton, there appears on one end: Net Weight Contents Twelve Ounces, and the carton also contains a list of various patents. It is an individual service carton, marked as being made by Pacific Coast Shredded Wheat Company, Oakland, California.

Carton 70 is dated January 15, 1917, a Canadian individual sample, containing a picture of Niagara Falls on one end and a single-biscuit plate on the other, and on the bottom: Patented May 27, 1898. This food, the process of making it, and the machinery used in the manufacture, are under the protection of the Government of the Dominion of Canada. Patents have also been taken out for the principal foreign countries.

Carton 71 is a three-color carton of the American Company, containing the same phrases we have referred to heretofore: Shredded Wheat is Made of the Whole Wheat and made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food. I recall that around that time.

It seems to me that the first attempt of Kellogg to put on a shredded wheat biscuit, which was finally abandoned, was about the time we began putting on: Net Weight of Contents Twelve Ounces, Twelve Biscuit, and so on. I think Ross was putting out a biscuit around that time. Anyway, this was a sort of reaction to competitors; an attempt to call attention to the fact we had twelve biscuit in the carton and that they weighed one ounce to a biscuit. A fellow over in Chicago started to make what we called Birds Nests, but I do not think that had anything to do with this.

Carton 75, dated 4/23/17, contains on the end, with the picture of the single-biscuit plate: Net Weight of Contents Twelve Ounces; Metric Equivalent 340 grams. Shredded (trade mark) Copyright, 1911, by The Shredded Wheat Co. Wheat. It's All In The Shreds.

Carton 77, dated 6/20/17, contains on the front face a representation of the Oakland factory of Shredded Wheat Company. It stills carries the two phrases: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding,

and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in the digestion of all food.

Carton 78 is the same type, with the picture of the Niagara Falls factory. Twelve Biscuit and Twelve Ounces have been emphasized on the cartons and in the advertising since that date, and, as far as I know about the advertising, it is still emphasized.

I recall the use of carton 82, dated January 22, 1918. That is the same form of colored carton, containing the phrases previously referred to and Twelve Biscuit, and It's All In The Shreds, with the picture of Niagara Falls. That picture was used on every carton of the plaintiff and its predecessors since it was first put on, no matter what factory, and in the advertising. That is The Home of Shredded Wheat. No matter where it is made, that is still the home of it. That is the idea it was intended to convey, that it was Niagara Falls Shredded Wheat.

The numbered dates on cartons 84 and 85 were, I think, approximately the dates when those cartons were printed or put into use.

Carton 86, dated 9/9/18, still contains the picture of one biscuit in a plate and the phrases previously quoted. On cartons 86 and 87 the list of patents has dwindled down to a very short list, five; and seven patent numbers on carton 89, dated 10/10/18. The cartons were ordered in considerable numbers. It was hard to keep an exact supply on hand.

FURTHER DIRECT EXAMINATION.

THE WITNESS: Roughly, I should say the Shredded Wheat Company began to print its own cartons about ten years before I left there, about 1920 or 1921. At that time, they put in their own printing plant. Since then, they have printed their own carton blanks. Those printing plants are running continuously.

CROSS-EXAMINATION resumed.

THE WITNESS: Until that time, cartons were printed outside in very large quantities and sometimes carried over for several years. Some cartons were printed in 1915 that still carried the 1911 copyright on them. One floor there in Niagara Falls was almost entirely occupied by cartons already printed. My recollection that the Ceres woman may have been used up to 1915 is probably correct. As we used the cartons from that floor, we kept the supply piling up, against the general protest and complaint of everybody. They could not see any reason for piling them up that way, away ahead of demand.

I think the carton on page 102 of volume three was just a proof from the printer. I do not think it represents any cartons. It is just a color proof. The finished carton would be something like carton 103, complimentary sample. On one end panel of carton 103 is a picture of Niagara Falls, The Home of Shredded Wheat. On the other panel, reading matter under the picture is arranged as follows: At the top: The Original Shredded Wheat. Under that, a plate containing an illustration of one biscuit and a spoon in a dish. Under that: Copyright, 1911, by the Shredded Wheat Co. Some distance under that, in brackets: trade mark. Under that is: It's All In The Shreds. The words *The Original* above Shredded Wheat were also a reaction to competition of some sort and were put on there because another shredded wheat was being made. We wanted to identify this Niagara Falls Shredded Wheat as the original one. That was used for a while, and, I think, abandoned. That was, however, the reason for putting it on.

Carton 104 has on one end panel a picture of Niagara Falls arranged in a new way from any of the others, preceding it. That picture of the Falls has, I

think, always been in this same general form. On the other end of the carton are the words: Net weight of contents 12 ounces; metric equivalent 340 grammes. The Original Shredded Wheat. Below that: a dish with one biscuit. Under that, the words: Copyright 1911 by The Shredded Wheat Co. Under that in brackets: trade mark. Under that the word *twelve* and the numeral 12 in brackets, and *biscuits*, plural, and the phrase: It's All In The Shreds. I recall using that. The reference to Twelve Biscuit and The Original Shredded Wheat were a reaction to competition, again, put on there to tell people to look for the original Niagara Falls Shredded Wheat. That carton, dated March 6, 1921, still carries: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding, and baking; and: The crispness of its shreds promotes thorough mastication, which is the first process in digestion of all food.

Carton 106, marked Spring of 1922, is the same general type of carton we have been talking about, with the additional phrase: As made for twenty-five years, which appears also on carton 104. That was a new phrase which I think was added about the time Kellogg's biscuit first appeared on the market.

Carton 107, sample biscuit carton, also contains in large letters above the words Shredded Wheat, the words *The Original*.

Carton 112 contains on the dish end the words: The Original Shredded Wheat. The phrase: trade mark has been moved down below the dish, and the phrase: Copyright 1911 by the Shredded Wheat Co.

Getting to carton 119, the patent notices have entirely disappeared off the cartons. They had expired. They have been off the cartons for some time. Carton 117, marked 1923, has no patent notices on it. On carton 119, the trade mark expression is underneath the plate, under the words: Copyright 1911 by The

Shredded Wheat Company, and above the words: Twelve Biscuit. At the top of the panel are the words: The Original Shredded Wheat.

Carton 130 has directions in Hebrew on the rear face, and the words in English: Shredded Wheat is the Whole Wheat, and is cooked in steam, shredded and baked. And "Kosher," with the Rabbi. Underneath that: Shredded Wheat is a clean, strictly Kosher food, and here is the Rabbi's seal. It says: It may be eaten with milk or meat throughout the year, except during Passover.

Carton 131, not dated, also 130, are the first cartons in which the end panel with the dish has a little different reading matter, as follows: Net weight, 12 ounces. Metric equivalent 340 grammes. Original Trade Mark Shredded Wheat Reg. U. S. Pat. Off. Then, the representation of a dish with one biscuit. Copyright 1911, by The Shredded Wheat Co. Twelve (2) Biscuit. It's All In The Shreds. I remember all these changes; but I could not fix any definite date for them.

Such matters as the trade mark expression being put down under the dish, as in carton 121, were decided by an executive committee of the board, Mr. Porter and Mr. Mitchell. In a carton like that, the executive committee put that expression trade mark down at the bottom of the panel. Those were matters of company policy which we originated and discussed. We usually went all over them at our Tuesday luncheons and decided all those things.

It was following that policy that the words: The Original were put above Shredded Wheat and the words Reg. U. S. Pat. Off. were placed below on carton 131. It was along about 1926 when the registrations were made, or later. I remember that package being changed some date after 1926. It carries: Shredded Wheat one hundred per cent. Whole Wheat and is made

digestible by cooking in steam, shredding and baking. Competition also suggested that one hundred per cent. which is not on previous cartons. The carton also contains: The crispness of its shreds promotes thorough mastication, which is the first process in digestion. It leaves off the word *food*. Made of Whole Wheat. Those little changes were made after discussions at our Tuesday meetings and I know they had in mind competition of some kind.

That would dictate the difference between carton 117: Shredded Wheat is made of the Whole Wheat and is made digestible by steam cooking, shredding and baking; and carton 131: Shredded Wheat is one hundred per cent. Whole Wheat and is made digestible by cooking in steam, shredding and baking. That was a reaction to competition, for fear there might be some question as to whether we used the whole wheat grain. Lots of people thought we did not. Every once in a while we would meet people who thought we had discarded a part of the whole wheat, did not use the bran.

Carton 132 still contains the expression: It's All In The Shreds. The expression: trade mark has been moved up from the place underneath the plate to the place above Shredded Wheat and under the words: The Original.

On the English carton, 134, the end panels are different from the American cartons. One end panel shows a package spilled out so as to show eight biscuit. The panel at the other end shows: Net weight 12 ounces; metric equivalent 340 grammes, and the words: The Original Shredded Wheat, a plate showing two biscuit in a dish, and: Copyright 1911 by The Shredded Wheat Co., Ltd., and: Twelve (12) Biscuit, and: It's All In The Shreds. That was used over there. That was the basis we used. They just took that. That was based on an American panel. The carton

was designed in Niagara Falls but used in England. It says: Copyright 1911 by the Shredded Wheat Co., Ltd., but the English carton has no reference to trade mark. I remember making this change on this one.

Carton 135, in volume three, is marked: Copyright 1926, by the Shredded Wheat Co. on the back panel; and, on the front panel, above the picture of the factory, under the words Shredded Wheat, is: trade mark, Reg. U. S. Pat. Off. On the back face, the language has been changed to read: Shredded Wheat, trade mark, Reg. U. S. Pat. Off.; made of the Whole Wheat—nothing added, nothing taken away. Contains in a digestible form all the elements for building muscles, bone and brain. Ready-cooked, ready-to-eat. It also contains in red very prominently the phrase: All the bran in the Wheat. That was also a reaction to competition of a bran product, Kellogg's Bran, and the other bran foods, of course. This carton has eliminated those expressions about being made of whole wheat and containing shreds in digestible form to get in this display. We wanted to emphasize all the bran in the wheat and twelve biscuits or twelve ounces. In order to give them proper display we had to condense all this, so we took off some of the reading matter. That, again, was a reaction to competition against shredded wheat. Those changes were the result of conferences between the executive committee and the rest of us. On that carton we dropped the expression: The Original. I do not know why. We arrived at the conclusion it did not amount to anything, that we did not gain anything by it and several things were much more important. I never liked the expression, but some of the rest did. It has still continued to be known as the Original Shredded Wheat. As a result of the advertising, the product, since at least 1911 has been generally known as Niagara Falls Shredded Wheat. Much of

our trade has been connecting it with Niagara Falls. It has advertising value, of course. It is even on the Pacific Coast cartons, Niagara Falls being emphasized. From the 1926 cartons onward we have continued to display the picture of the factory and of Niagara Falls. We are still using the term: It's All In The Shred. It seems to me that this red line was: As Made For Thirty Years, instead of: As Made for Twenty-five Years. That was put on the 1926 carton when they got into use a year or so later and was used continuously since during my connection with the company. As Made For Thirty Years was to emphasize the fact it was the original Shredded Wheat.

Noting the two-biscuit plate on carton 142, marked Copyright 1926, I thought that was displayed before 1926, but perhaps it was not. A number of these cartons have the two biscuit in the dish. 1926 is probably correct.

The French carton, dated 5/9/30, has pasted there on a slip reading: Subject: Canadian Shredded Wheat carton. Approved: Legal department. Date: 5/9/30. File Number: Blank. Sample finished job, new, C. A. V. and H. J. S. That is the approval of the new carton. It is stamped with a green stamp marked: Legal department received May 10, 1930. I was not connected with the company when that carton was approved or put out. The change was made in the picture of the biscuit across the face of the carton. From that date on I would not know anything about them.

I would not, I think, know anything about the putting of the phrase: Made since 1893, on the next carton, approved by the legal department 4/13/30. It seems to me we varied that expression a little, putting that instead of saying thirty years. The carton is marked: Copyrighted 1929, by The Shredded Wheat Co. I knew of this being done with the carton, but it was not under my direction. These changes were made

after the National Biscuit Company took over the company. I knew about them and was familiar with them, because I saw Mr. Oliva almost every day. I still handled the Shredded Wheat business, but through the Frank Presbrey Company. My connection with the cartons ceased.

The carton marked: Shredded Wheat carton, legal department, approved June 19, 1929, is the last carton we find containing a picture of Niagara Falls on one end and the two-biscuit plate on the other. The next carton, marked approved 4/30/30, above that carton, contains on each end the picture of Niagara Falls with: The Home of Shredded Wheat; and, across the face of the carton, the large picture of the shredded wheat biscuit.

I recognize the letter, Defendant's Exhibit 9, and the enclosure regarding the first attempt of Kellogg to make the shredded wheat biscuit. It was a letter dated August 16, 1927, addressed to News Editor State Journal, Springfield, Illinois. A number of letters like that were sent out to the newspapers which ran our Shredded Wheat advertising. That enclosure was a news item about it. It was the 1928 lawsuit against the Kellogg Company; and the enclosure marked: "Please do not publish before August 22nd," is the one referred to in the letter. It was part of my job to get all the free advertising we could. We asked them to print that as a news item. Letters like that were sent out generally to publications in which the Shredded Wheat Company advertised, with the request that they reproduce the news release.

I identify this enclosure as a sheet of a newspaper containing a reproduction of one of the articles prepared and sent out by me as vice-president of the Shredded Wheat Company. They were sent out to publications generally in which the Shredded Wheat Company advertised. We sent one to every newspaper

carrying our advertising, and, perhaps, other newspapers. It went to our list, as it often did when we wanted to get anything across. We used these newspapers as much as we could. One object was to get a correct statement of the case, and another, to get the advertising; and, also, to have the suit as widely known as possible, to have the fact of the filing of the suit by the Shredded Wheat Company against the Kellogg Company as widely published as it was possible to have it.

(The second enclosure, newspaper article, referred to, was marked "Defendant's Exhibit 10.")

Defendant's Exhibit 9 is as follows:

"The Shredded Wheat Company, Niagara Falls, N. Y., August 17, 1927.

Truman A. DeWeese, Vice-President in Charge of Publicity.

The News Editor, State Journal, Springfield, Ill.

Dear Friend: I am sure you will agree that the enclosed item, referring to our suit against the Kellogg Company, has enough news interest to justify its publication in your paper. The item will no doubt come to you through the regular news channels; but, as it vitally concerns the interest of this Company that has been a consistent advertiser in the newspapers for thirty years, I am sure you will appreciate our efforts to give you the exact facts. I know you will not want to show any prejudice in the matter, and yet I am sure you will want to be fair to this company. For this reason, I have confined the news article to the claims made in the complaint which was filed in the United States District Court. The matter of editorial comment is left entirely to your good judgment. We would like to have it printed just as it is written; but, of course, you are at liberty to make any condensations

that will better adapt it to your columns and your policies. We are sure we can depend on you not to print it before the date on which it is to be released. Needless to tell you, any courtesies you may show us in this matter will be greatly appreciated by our Company, as well as by the writer. Very truly yours, T. A. DeWeese, Vice-President in Charge of Publicity. TAD-M."

The enclosure for release is as follows:

"Please do not publish before August 22d.

THE SHREDDED WHEAT COMPANY SUES KELLOGG

The Company Asks the Court to Restrain Kellogg from Manufacturing an Imitation of Its Product and from Appropriating its Trade Name and Goodwill.

A lawsuit involving issues of far-reaching importance to manufacturers of food products was started when The Shredded Wheat Company filed a complaint against the Kellogg Company of Battle Creek, Michigan, and certain grocers, alleging unfair competition and unlawful appropriation of its trade name and its good-will. The suit was filed in the United States District Court at New Haven, Connecticut, on Monday, August 22d. The occasion for the complaint is the attempt of the Kellogg Company and some grocery jobbers and retailers to market a biscuit which is an imitation of the product of The Shredded Wheat Company under the name Shredded Whole Wheat Biscuit. The filing of this complaint by the Shredded Wheat Company is notice of its intention to enforce its rights and claims for damages against any manufacturer, wholesaler, or retailer manufacturing or distributing any product that is an imitation of its product.

The complaint covers in detail the growth and development of the business of The Shredded Wheat

Company, the various methods employed to educate the public regarding the food value of the product, and the money expended in creating consumer demand and building good-will all over the world. It places the value of this good-will and trade name at millions of dollars and asks for an injunction against the Kellogg Company. The complaint alleges that for 34 years The Shredded Wheat Company has given its biscuit a distinctive form, size, and shape, and, by extensive advertising has so fixed this form, size, and shape in the public mind that, even when the biscuits are displayed separate and apart from the carton, they are recognized by consumers as a product only of The Shredded Wheat Company. They have employed the words Shredded Whole Wheat Biscuit and Shredded Wheat, not as descriptive of the process of manufacture, but as fanciful and distinctive designations, identifying their particular product and indicating the source of manufacture. The complaint avers that The Shredded Wheat Company has expended over \$24,000,000. in all kinds of educational work, until these terms or words have grown to be trade names of their product with only one meaning in the public mind in the United States and foreign countries, and that these names have not been used in respect to any other article of food for human consumption. Among the educational methods mentioned in the complaint are advertisements in newspapers and magazines, booklets, leaflets, lectures, store cards, and the distribution of millions of samples from house to house. It is also stated that an average of 100,000 persons have passed through the home plant in Niagara Falls every year for twenty years, to the end that customers now invariably associate the names Shredded Wheat Biscuit and Shredded Wheat with the one product made by The Shredded Wheat Company.

While much of the complaint stresses the unfairness of this sort of competition and the damage done to The Shredded Wheat Company through the appropriation of their trade name and good-will, a large portion of the complaint is devoted to calling the attention of the Court to the deception and fraud that will be practiced upon consumers who purchase the Kellogg Biscuit under the impression that they are getting the original Shredded Wheat Biscuit made by The Shredded Wheat Company, the only product associated with the words Shredded Wheat. Attention is also called to the fact that the consumer seldom sees the carton or container, hence he is easily led to believe that The Shredded Wheat Company is manufacturing a biscuit reduced in size and containing less wheat. The complaint alleges in fact that, in many instances, the Kellogg biscuit has been passed off as the Shredded Wheat Company's product. The complaint recites the fact that, in 1915, The Shredded Wheat Company brought a suit in equity against the Ross Food Company and certain grocers to restrain them from manufacturing and marketing an imitation Shredded Wheat. An injunction was issued restraining the defendants from making Shredded Wheat Biscuit, and this injunction afterwards was affirmed with some modification by the Court of Appeals.

It is further alleged in the complaint that the Kellogg package contains nine ounces of food as against the twelve ounces in the Shredded Wheat Company's package and is sold at less price as an additional means of deceiving the consumer who asks for Shredded Wheat and is given less weight under the impression that he is getting the real Shredded Wheat made by the Shredded Wheat Company. It is further claimed that, if Kellogg is not restrained, he will proceed to flood the market with imitation biscuit, relying upon the

market for Shredded Wheat Biscuit created through years of advertising. The complaint asks that Kellogg be restrained from infringing upon the rights of The Shredded Wheat Company, from manufacturing an imitation of their product, and from putting on the carton improper and misleading terms, thereby confusing the product of the Kellogg Company with the real Shredded Wheat Biscuit. The Shredded Wheat Company asks for damages to be assessed and an injunction issued."

THE WITNESS: At the time I referred to Mr. Rankine trying to get Mr. Perky out, about 1905, the Shredded Wheat business was still a very small business. Mr. Perky had built this wonderful, expensive factory at Niagara Falls, and the contractors threatened to close in on him. It looked kind of bad for him. Mr. Rankine and Mr. Porter and other members decided the business would have to be reorganized financially and Mr. Perky eliminated. That was just previous to my going in. I knew all about it. We offered him a salary of ten thousand dollars a year, and he could still be president, if he would withdraw his active interest in the business. He refused. He said he would not be in any business he could not run. His stock was mostly taken by Darius Mills, of New York. After that, the inscription in stone over the door of the Niagara Falls plant was changed from Natural Food Conservatory to: The Home of Shredded Wheat. Mr. Perky would not have consented to that change. Natural Food Conservatory was his idea. He originated the corporate name Natural Food Company. We also changed the name to The Shredded Wheat Company. Mr. Rankine was the man who had the real financial interest in the power company at Niagara Falls. When that was developed, they had to bring

industries there to use the power, which is how the Shredded Wheat Company was induced to move there from Worcester, Massachusetts, and probably the reason that Niagara Falls was emphasized through the advertising, making the product known as Niagara Falls Shredded Wheat. Mr. Perky realized there were a million or more visitors there every year. If they went through the factory, they would be our greatest advertisement.

If a customer went into the grocery store and asked for Niagara Falls Shredded Wheat, I should think the grocer would know right away what was meant by that.

The little machines or mechanical exhibits I spoke of, for manufacturing shredded wheat, showed the shreds being drawn out into shred form and then being put into shape as biscuit. The idea of that was to show the whole process by which the wheat was cooked by steam and drawn out into little shreds through grooves, you know, and baked. In some miniature factories the entire process was carried out; in others, they just showed the shredding process, because the shredding had a little novelty to it, and it attracted sightseers. That was all to show that this wheat was drawn out into shreds or strings and put into biscuit form. The mechanical advertisements were used for about ten or fifteen years.

The Niagara Falls idea was emphasized. Some illusion may have been drawn into magazine advertisements occasionally to the fact that you got power from Shredded Wheat.

The glass globes were still being used here and there at the time the National Biscuit Company took it over, but they did not issue them in any amounts. Some restaurants here and there had some of those globes; and Mr. Carr, the general sales agent, distributed some of those during his administration, which

was about until National Biscuit took over. If some one asked for a globe, we would still give them. It has been about four or five or six years since they ceased to be a feature. They simply dropped them as an important or valuable feature, but continued to supply them whenever they were wanted.

During all my connection with the company, the product was always referred to at the same place on the carton as Biscuit, and Twelve Biscuit. In other places, we just say Shredded Wheat.

Shredded Wheat means that pillow-shaped biscuit made out of wheat and put up into shredded form. With my experience and knowledge, it means the Shredded Wheat made at Niagara Falls.

I think that, in the last few years, when Mr. Carr became sales manager, occasional orders were given for the glass globes. I am pretty sure Mr. Carr put out some; because I know we discussed the question of changing the globes to a square container and finally decided to keep the round globe. So there must have been some distribution. I would not say they were dropped ten or twelve years ago. They continued putting them out; but it was not such a prominent or valuable factor. I think some of the sales agents carried them around to supply the restaurants; but it was not pushed as hard as it had been. The agents used other methods of getting into restaurants, cafes, etc.

The plaintiff and its predecessors have used the individual style of biscuit for furnishing the restaurant trade a great many years. As far as I know, the policy of the company has been to push in every way the sale of these individual cartons for use in the hotel and restaurant trade. There has been no effort on their part to hold back or retard the sale of the biscuit in the individual cartons, that I know of. It has been the policy of both the companies, as far as I could judge, to create all the demand they could for individual car-

tons for use in the restaurant and hotel trade; and, as far as I could tell, the Kellogg Company has also tried to sell its individual cartons as far as it could. As far as I know, both companies have discouraged the practice of taking the biscuit out of the large carton in selling them in hotels and restaurants; but there were certain classes of restaurants, big restaurants, that would sell them only out of the big carton. They had to do it ahead, some of them, and it was quick service. They did not want to open the cartons, for counter restaurants and other places. They still stick to the big carton. In the better class of restaurants, cafes, and hotels, they are served in the individual cartons. I believe the great bulk of the restaurant, cafe, and hotel trade now serve them in individual cartons.

RE-DIRECT EXAMINATION.

THE WITNESS: Refreshing my memory by looking at trade-mark registration 216593, August 17, 1926, with two biscuit in the dish, and observing the affidavit states that has been continuously applied to said goods since November 15, 1909, I am able to state that they began using the picture of two biscuit in the dish about that time, on the ends of the cartons and in all our advertising. This particular special application for trade-mark I do not recall. It was done by Charlie Brown, treasurer. I know that is about the date we began using two biscuit in the dish. If the sample cartons in Plaintiff's Exhibits 2, 3 and 4 do not show that, I would say that was a complete history of the cartons.

RE-CROSS-EXAMINATION:

THE WITNESS: Noting registration of the Shredded Wheat Company 85186, January 30, 1912, and the representation of a single biscuit, I remember the use of one biscuit in the plate from September 15, 1909 on.

In going through the cartons today, while we were unable to produce or find any illustration or carton showing a plate containing two biscuit, until sometime after 1926, I think the use of the two biscuit in the dish certainly antedated 1926.

MRS. CAROLINE CAVALIER.

Deposition taken at New York, N. Y., January 1933.

DIRECT EXAMINATION.

THE WITNESS: I live at Stamford, Connecticut and am a housewife, keeping house. I recognize Plaintiff's Exhibit 1, Shredded Wheat, with which I have been familiar seven years in connection with my household. I have to be a user of Shredded Wheat. I have known it longer than that. My husband was put on a diet seven years ago. The expression shredded wheat has no meaning for me other than the article in Plaintiff's Exhibit 1. I purchase Shredded Wheat at any store I can get it. Sometimes I come through New Haven and stop at different stores, and the A. & P.

I recently had an experience in purchasing Shredded Wheat in a store in South Norwalk on East Avenue, A. Greene's. I asked for Shredded Wheat, expecting they would give me Shredded Wheat, but they gave me Kellogg's Whole Wheat. I did not stop to think or look at it until I got home. I saw the package when it was handed to me. I was buying three or four items at the time. When I got home, I noticed it was Whole Wheat. Plaintiff's Exhibit 80 is the package. That is my only experience of that kind. I had never seen Kellogg's Whole Wheat Biscuit before. I did not open this package.

I recognize the article taken by Mr. Vilas from Defendant's Exhibit 6 as Shredded Wheat, but I cannot

tell what kind it is. It looks the same as Shredded Wheat, and is the same shape and texture; but the other is just a little bit darker, I think. I never saw this biscuit before. If I saw this package as the one I have described in South Norwalk and the printing were obliterated except the picture, by those biscuit, you could not really tell the difference in the biscuits; but the box is different. The picture on the package looks like Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: The first time I noticed this Kellogg package was when I got the groceries home. I had never seen Kellogg's Whole Wheat before. The minute I saw the package I recognized it right away as a different box.

I did not open it, because there is a National Biscuit man, a friend of ours. My husband sells automobile parts. He happened to be there this morning, going to New York, stopped in, as always, for some equipment. I had just laid the things on the table. He wanted to look at that package and asked me if he could have it. Two days later, he told me there was a lawsuit and would I tell where I bought it and what the fellow said when I bought it. That was the only time I ever received this kind of biscuit, because I have been getting it at the A. & P., right around the corner. I happened to be at New Haven and stopped at the economy store for some groceries.

MRS. LEON E. TUTTLE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I keep house. I have been a nurse. I recognize Plaintiff's Exhibit 1 as Shredded Wheat,

with which I have been familiar about twelve years. During that period, I have used it and purchased it from time to time. The expression shredded wheat does not convey to my mind any other product than the product contained in Plaintiff's Exhibit 1. I buy it at different places.

I have recently had an experience in purchasing Shredded Wheat, at the store of Frank Connolly, on Elm Street, in Stamford, Connecticut. I made a couple of purchases, asked for Shredded Wheat and was handed this box. I did not make any remarks to the grocer, and he did not say anything. I just accepted that along with my other purchases. This was December 30, 1932. Plaintiff's Exhibit 82 is the box and the cash slip that went with it. I was asked by the National Biscuit manager in Stamford, Mr. Beddell, to make this purchase. I did not go to any other stores. I paid for the items indicated on the slip, Plaintiff's Exhibit 81.

CROSS-EXAMINATION.

THE WITNESS: I knew right away, as soon as I saw this Kellogg package, it was not the Niagara Falls package I had been getting. I never had seen any of the biscuit inside the Kellogg package; but I have seen it since. I did not open up one of the packages, but I have seen them in Stamford and I saw one downstairs this morning. They all look much alike. I noticed the difference in size, Kellogg's being the smaller. I came down this morning from Stamford with Mrs. Cavalier. Mr. Beddell brought us, the National Biscuit general manager, who asked me to make this purchase. He told me to take whatever the clerk gave me.

RE-DIRECT EXAMINATION.

THE WITNESS: On the purchase slip appears, among other items, "One Sh. Wht." That is one Shredded Wheat. I paid twelve cents for that.

RE-CROSS-EXAMINATION.

THE WITNESS: That is the only experience I have had with the Kellogg biscuit. I buy Shredded Wheat right along. I have never seen the Kellogg product anywhere except in this one store.

CHARLES BERMAN.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, in the business five years; with no experience in the grocery business before. I recognize Plaintiff's Exhibit 1 as Shredded Wheat, with which I have been familiar a long time. We used to use it in the house, have used it for several years. We carry it in the store.

If a customer asked me for Shredded Wheat, I would give her Shredded Wheat, never had any other kind. I never knew of anything else under that name. I never had Defendant's Exhibit 6. If I saw the package with just the picture, without the name, I would say it was Shredded Wheat. To compare it with Plaintiff's Exhibit 1, I would have to look at the inside to see what it looks like. Otherwise, I would not know. The biscuit taken out of Defendant's Exhibit 6 looks like Shredded Wheat. There is a resemblance between the contents of Plaintiff's Exhibit 1 and the contents of Defendant's Exhibit 6. They look alike, except in size. If a customer asked me for Shredded Wheat and I had Defendant's Exhibit 6 in stock, I would not give them to her; because, if she asked for Shredded Wheat, I would have to give her Shredded Wheat.

Q. 20. Would you recognize Defendant's Exhibit No. 6 as Shredded Wheat? Is that what I understand you to mean?

A. I could not.

Q. 21. Do I understand, then, that you understand Shredded Wheat as a term applicable to one product only?

A. Yes.

THE WITNESS: I do not know what to think of a product like Defendant's Exhibit 6, looking like Shredded Wheat. I never had it and never heard of it before until the other day from a woman. She came in and asked for a package of Shredded Wheat. I took it off the shelf. She said, "No, I do not want that." I said, "What do you want?" She said, "It is a little smaller than this." She did not know the name or who made it. She is a customer of mine. She said, "They come in a little small, square package." I said, "I never heard of it. I can ask the salesman tomorrow." The next time he came, I asked him and he gave me a square package of—I forget the name of them; not like Defendant's Exhibit 6. It was a square biscuit. It was Triscuit he sent me. She came in. I showed it to her. She said, "No, it is not that. I will get you the empty package." The salesman lives near me. I asked him, and he said, "No, I have no other kind but these two." She brought me the package and showed me that, which was the first time I saw it. I had never heard of it. I did not see the biscuit. She is the only one I ever had a call from for this other biscuit. I have had people ask for the Niagara Falls product, some of them—always Shredded Wheat most of the time. Some people come in and say, "Give me a bale of hay." When they say that, I know what they mean. I always have it on display.

CROSS-EXAMINATION.

THE WITNESS: We handle corn flakes, no bran flakes. I have heard of shredded codfish and shredded coconut. I handle them. I have Post Toasties, which

is a corn-flake product. I do not know any other name for Shredded Wheat, except Shredded Wheat. If anybody asked me what a Post Toasty was, I would say it was a corn flake. If anybody asked me what shredded wheat was, shredded wheat is the only name for it I know.

There are several different kinds of whole wheat biscuit, so I would have to see a picture of Whole Wheat Biscuit to know what it was like. Looking at Defendant's Exhibit 6, if I saw that package for the first time and could not see the plate, I would have no idea what was in the package. I would have to open it to find out. To that extent, it is purely a blind package, as to telling the contents of the package from the name.

RE-DIRECT EXAMINATION.

THE WITNESS: If I saw the picture of the dish on the package, that would be a different story. I could then tell what was in the package.

RE-CROSS-EXAMINATION.

THE WITNESS: It is a common practice in the food line and most of the canned products and packaged products I have carry a picture of a plate with some of the food shown therein.

RE-DIRECT EXAMINATION.

THE WITNESS: I never saw shredded coconut or shredded codfish made up in a pillow-shaped biscuit, just loose in a package or box. I used to wonder why they called this Shredded Wheat, anyway.

HANNAH BENDER.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I know Shredded Wheat and have known it for about two years, but I do not have it so often now. I recognize Plaintiff's Exhibit 1. That is what I know as Shredded Wheat. Plaintiff's Exhibit 113 is a package I have brought with me. I happened to walk into Sixty-eighth Avenue, B. Weiss. He handed me a package of Shredded Wheat. I looked at it. It did not seem so nice a box, from my standpoint. It was dirty. While I looked at it, he told me he had a small size of the same thing he can give me. I said all right and asked him if that was the same. He said, "Yes, that is the same thing." He gave me Kellogg's Whole Wheat, this package I have brought here. I took it because he told me it was the same. I did not use it. I gave it to one of the National Biscuit Company salesmen. This happened December 5th, 1932. That is the only time I received a package like that. Prior to that, when I asked for Shredded Wheat, I expected to receive Shredded Wheat, like Plaintiff's Exhibit 1.

CROSS-EXAMINATION.

THE WITNESS: The National Biscuit salesman I gave the package to I just know as Benny. I cannot remember his second name. He told me to go in that store and ask for Shredded Wheat, and to take whatever they gave me. The only reason I did not was I thought it was a dirty package. While I looked at it, he said, "I have the smaller size, if you care to have it." Benny had told me before that there were two kinds of shredded wheat on the market; but I had never before seen Kellogg's. He told me there was another kind of

Shredded Wheat; but I did not know it was Kellogg's. That is not my regular store. I take anywhere I go, when I feel like, because it is in the market. Benny told me to go to just that one store, no other. I never did open up a package of Kellogg's before, and I do not know what it looks like inside.

NATHAN SALBIN.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a grocer located at 104 Orange Street, Newark, New Jersey. I have been in the grocery business twelve years, no experience in it before that. I am in business with my father.

I recognize Plaintiff's Exhibit 1. I call it Shredded Wheat, with which I have been familiar ever since I have been in business. When our customers ask for Shredded Wheat, I give them a package of that style, like Plaintiff's Exhibit 1, with a picture of Niagara Falls on it. I do not know anything else my customers would have in mind when asking for Shredded Wheat. When customers come in for Shredded Wheat, I know what they mean and what they want. When they ask for Shredded Wheat, I give them the package with the Niagara Falls picture on it. They ask for Shredded Wheat, and that is really the only one I have. We do not handle the other. When I supply them that package, I never have had them bring it back and say it is not what they want.

I have seen a package like Defendant's Exhibit 6. I do not handle it. If I saw a package like Defendant's Exhibit 6, with the name covered up, it would be pretty hard to say what was in the package. I see a picture there. It is a biscuit in some form. I never saw any of

Kellogg's Whole Wheat Biscuit until today. I have had salesmen come in and talk to me on it; but they never showed it to me, because I told them I was not interested in it. I had no trade for it whatever. I never had anybody come in and ask me for Kellogg's in the last few years. If they come in and ask for Shredded Wheat, I give them Shredded Wheat. I give them what I have.

GEORGE OLIVA.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am assistant advertising manager of the National Biscuit Company. I was advertising manager for some years. Since the National Biscuit Company acquired the Shredded Wheat Company, I have been in charge of Shredded Wheat advertising. I have brought with me samples of advertising which have been used since I have charge of it.

I identify Plaintiff's Exhibit 108 as one of the volumes containing some of the samples of advertising used by the National Biscuit Company for Shredded Wheat in 1932. At the request of Mr. Vilas, I have prepared table of amounts expended by the National Biscuit Company in advertising Shredded Wheat during the years the company has had the Shredded Wheat Company. Plaintiff's Exhibit 114 is a tabulation of the figures of 1927 and 1928, secured from our general office and the statements of the old Shredded Wheat Company, old Shredded Wheat books in the custody of the company. They are absolutely a correct transcript of the books, as far as I know.

Plaintiff's Exhibit 115, consisting of four sheets, shows the expenditures by media from 1929 to 1932.

inclusive, for different kinds of advertising, which expenditures were made under my direction. The pencil note in 1932 indicates that sampling was started again in 1932, approximately three hundred thousand dollars expended for it, which should be added to the total appearing on the fourth sheet for 1932.

After the National Biscuit Company took over the Shredded Wheat Company, the advertising policy of the old company was practically continued, with some slight, not very noticeable changes of media, although the copy theme has been more or less the same. Colonel DeWeese continued to write advertising copy for Shredded Wheat all the time up until 1932.

I have with me samples of store cards, hangers; and the magazine and newspaper copy is in Plaintiff's Exhibit 108.

Plaintiff's Exhibit 116 is a floor cut-out, in which the actual packages are inserted. It stands up like an easel. The packages hold up the exhibit. We ordered fifty-one thousand, all of which are or have been in use. Plaintiff's Exhibits 117 and 118 are cut-outs, on which there were two runs, fifty-one thousand for each run; with the picture of Niagara Falls, used with packages, similar to the previous one.

The four pieces marked Plaintiff's Exhibit 119 are price cards, printed out of the waste coming out of the previous cut-outs. They were used in stores for the display of the product, Shredded Wheat. We had fifty-one thousand of each of those pieces.

The eight carton inserts marked Plaintiff's Exhibit 120 are slips placed in the National Biscuit Company varieties. The total number of these carton slip inserts used is twenty-eight million five hundred and sixty thousand. They are mechanically inserted in the packages of biscuit when they are put up.

Plaintiff's Exhibit 121 is a window poster, to be pasted on the grocer's window. Fifty-one thousand

of those were ordered, and practically all have been used. That is recent, the hundred and ninetieth edition.

Plaintiff's Exhibit 122 is a three-sheet poster, approximately forty-one inches by eighty-two inches, placed on the elevated stairways in New York, Brooklyn, and the Bronx. We have used seven hundred of those. In addition, we have a one-sheet poster, with the same design, which goes on the delivery equipment of the National Biscuit Company all over the country. We ordered two thousand seven hundred and fifty of them.

Plaintiff's Exhibit 123 is a shopping bag which is distributed at food shows. We ordered twenty thousand and have used about fifteen thousand.

Plaintiff's Exhibits 124, 125 and 126 are hanger cards, to be hung in grocery stores. Of the carton inserts mentioned before, added to Plaintiff's Exhibit 120, we have used eighteen million three hundred and sixty thousand. Of Plaintiff's Exhibit 124 we have used twenty-five thousand; of 125, seventy-two thousand; and of 126, seventy-six thousand five hundred; all distributed.

Plaintiff's Exhibit 127 is a price card to go with a stack of Shredded Wheat in cartons. We have ordered fifty-one thousand of those, and they are all out.

Plaintiff's Exhibit 128 is also a price card, red. We have had fifty thousand of those.

Plaintiff's Exhibit 129 consists of four broadsides we send out to our salesmen, telling them about our Shredded Wheat campaign that happens to be running at the time. We use three thousand of each of those.

Plaintiff's Exhibit 130 is a recipe book, being used currently. We have ordered five hundred and twenty-three thousand. Practically all of them have been used. We are right at the end of the book.

Plaintiff's Exhibit 131 is a restaurant hanger for restaurants, lunch rooms, and drug stores, supplied by us to them. Ten thousand seven hundred were ordered, and they have all been used.

Plaintiff's Exhibit 132 is a restaurant menu of the kind now supplied by us. Since March, 1929, we have purchased approximately eight and a half million. Our predecessors used millions of them before we took over. They are still being distributed. They have been changed slightly. This is one at present in use.

Plaintiff's Exhibit 133 are three window posters. The combined order of the three was approximately 200,000.

Plaintiff's Exhibit 134 is window posters, designed to be pasted on the window, suggesting the sale of Shredded Wheat, with strawberries. We had fifty-three thousand seven hundred of those, all in 1932.

Plaintiff's Exhibit 135 is a price window poster, sixty thousand of which have been used.

Plaintiff's Exhibit 136 is a panel poster, fifty-one thousand of which were ordered. The distribution is going on now. It is used in the store window right alongside a wall.

Plaintiff's Exhibit 137 is one of the postcards which are distributed to visitors at the Niagara Falls factory. A hundred and fifty thousand of those have been used; but we have had previous orders, of which we have no record. They are in use at the present time.

Plaintiff's Exhibit 138 is a letter and circular which were distributed with free samples of Shredded Wheat from house to house. In the last six months of the year, sampling was done in a national way, from coast to coast. Practically nine million of these circulars were distributed with small sample packages, the individual-size package, with two biscuit in it, the standard large-size biscuit. The National Biscuit Company has continued to make use of the picture of a dish with two

biscuit in, as shown on some of the exhibits I just handed you. Every time we use an illustration with biscuit in the dish, there are always two of them.

The large volumes or bundle I have here, three bundles, marked Plaintiff's Exhibit 139, are newspaper schedules, a list of the papers in which our advertisements for Shredded Wheat appear, showing the dates.

(The examination was continued until the following day, January 5, 1933.)

CROSS-EXAMINATION.

THE WITNESS: The representation of Niagara Falls as on the large cut-outs and store cards has been a prominently displayed feature of the plaintiff's advertising since I have been connected with it, more recently, within the last two years. But Niagara Falls has been very strongly featured in connection with Shredded Wheat. On some of the large cut-outs we have prominently featured Twelve Full-Size Biscuit. That type of expression has been prominently featured in that way in the last year. The plaintiff has some smaller-sized biscuit, the individual restaurant size, a little smaller in length than the Kellogg biscuit, possibly. I do not know. I never measured them. They are slightly smaller than a full-sized Niagara Falls biscuit, what we call an individual or restaurant-sized biscuit. I do not think our standard-sized packages have ever contained more or less than twelve biscuit to the package. We pack thirty-six packages to the case, which has been standard practice, except we have put up some bundles. I think there may be four in a bundle. All cases have contained thirty-six, as far as I know the practice of the plaintiff.

As long as I have been connected with plaintiff, the term: The Home of Shredded Wheat, with the Niagara Falls factory, has been featured strongly in con-

nection with the packages, on all packages. All our advertising copy is submitted to the legal department before it is released. That has always been done. Every piece of copy prepared has been submitted to the legal department.

I was with plaintiff's organization when Plaintiff's Exhibit 10 was changed by dropping the picture of the plate with two biscuit on one end and substituting therefor Niagara Falls. I do not know the particular reason for that. It was not done to emphasize the picture of Niagara Falls on both ends; but I am not able to suggest any other reason. It was done about two and a half or three years ago. At the same time, the large picture of a shredded wheat biscuit was put on the front face of the carton. I do not know, but I think *It's All In The Shreds* was dropped sooner. Looking at Plaintiff's Exhibit 10, I see that that expression appears under the plate on the end. If that is the only place it appeared, that would tend to refresh my recollection, because that whole panel was changed. That is only on the large package. It still appears on the small individual package. I know the plaintiff at the present time is marketing two sizes of individuals, one with the standard size biscuit, and the other a smaller, sized biscuit.

In explanation of the heading: Advertising Salaries, on the advertising statements I submitted, the old Shredded Wheat Company charged certain advertising salaries to advertising expense. I think it consisted of salaries of girls who mailed out literature, direct advertising. I know it did not include the advertising manager's salary, because that was 1928 and 1929. That practice has since been discontinued. In our system of bookkeeping, salaries are not now included under the advertising account. We do not charge any salary of demonstrators, samplers, or salesmen to advertising. Advertising items include simply straight

items of expenditure, either for space or material, or the like.

I have looked the books of sample cartons here in evidence over. I know there have been a number of changes. I did not make the books up. The cartons were changed very often, previous to my time. Since I have been with them, I think the most important change we made was putting the biscuit on the carton. I would not say that the substitution of Niagara Falls for the plate was so important. The biscuit was put on there to add a little attractiveness to the package and show the contents of the package. I would not regard the illustration as being foreshortened in any way. It is the actual size of the biscuit. It does not create the impression of the biscuit being any shorter than it actually is. It was put on to improve the appearance of the package in general. As an advertising man, I would regard that biscuit, insofar as it blots out part of the representation of the factory and the large phrase, The Home of Shredded Wheat on the old carton, as an æsthetic improvement of the carton and its appearance.

RE-DIRECT EXAMINATION.

THE WITNESS: It is the practice of the National Biscuit Company to feature on a large proportion of their cartons a picture of the goods contained in the carton. It is at the present time the general policy to do so. That includes such items as soda crackers, ginger snaps, and cookies of various kinds.

RE-CROSS-EXAMINATION.

THE WITNESS: I would not say that the practice of illustrating the product itself on the outside of the carton is very old. More of it has been done in recent years. I would be surprised if told Mr. Clarke went to a grocery store and picked out many dozens of cans

and packages, all of which had representations of goods in a dish. I do not think there are many in a dish. I do not recall any offhand. It is not an uncommon practice to illustrate the product in an edible and appealing way on the outside of the package. My experience with the plaintiff does not go back to a discussion whether one or two biscuit should be featured in a plate. That was before my time.

RE-DIRECT EXAMINATION.

THE WITNESS: The plate with two biscuit in is still in use by the National Biscuit Company in all our advertising material. We still use it on the small carton. It is on the latest large carton, which has not yet come out.

RE-CROSS-EXAMINATION.

THE WITNESS: On Plaintiff's Exhibit 136, the biscuit do not look longer than the actual biscuit itself. That package to me is a little larger than the actual sized package. So the illustration of the biscuit would be larger. In every one of the four places in which biscuit had been illustrated on the package, the question of length is fully represented actual size. The carton shown at the bottom of Plaintiff's Exhibit 136 is in the actual colors of the carton. Plaintiff's Exhibit 1 is not the same package. That is the new package that is being run at the present time, the one with deep blue background, as appears on Plaintiff's Exhibit 136. The illustration of the carton on Plaintiff's Exhibit 136 is not an accurate representation of the carton of the plaintiff as it is being marketed at the present time. That particular package is not out yet. It is being prepared for marketing by the plaintiff. In that package, the factory is exactly the same factory, the same position of it. You are looking at the one on

your left in perspective, and it distorts it a bit. The factories should be exactly alike. They are not different in detail. The background is changed, and some little lines have been removed. One is a lithographed reproduction, which always brings out the colors a little better than the printing on the carton itself.

HENRY W. STENECK.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am now a wholesale grocer, located in Brooklyn, and have been in the wholesale end about four years, always in Brooklyn. I was in the retail grocery business in Brooklyn for about forty years. I recognize Plaintiff's Exhibit 1, Niagara Falls Shredded Wheat. I have known and think I have been selling Shredded Wheat something like thirty years, at retail as well as wholesale. The purchasing public mean, when they ask for Shredded Wheat, Niagara Falls Shredded Wheat, like Plaintiff's Exhibit 1. When the public hear the expression shredded wheat, they think of Shredded Wheat. That is wheat that is shredded. That is about the only way you can bring it out. When customers asked me for Shredded Wheat, I never gave them anything else except the product represented by Plaintiff's Exhibit 1.

I am a little familiar with Kellogg's Whole Wheat Biscuit, such as Defendant's Exhibit 6. I have carried it in the wholesale business. Kellogg's salesmen came to us with shredded wheat and asked us to take twenty-five cases. We did not want to, but they explained they would sell it for us and have their wagons come and pick it up. The wagon came down

and back, sometimes two packages, sometimes five cases out at a time. They would sell them, come back, and take more. We got rid of the first twenty-five, and he induced us to take another twenty-five. We have not sold any direct, ourselves, only through the wagon, what they came and took away.

Looking at Plaintiff's Exhibit 10, particularly in reference to the dish on the end of the package, I am familiar with it and have been quite a long while, probably longer than ten years. They had thirty-six in a case, I believe. Looking at Defendant's Exhibit 6, with the name obliterated and the picture exposed, that suggests Shredded Wheat to my mind.

CROSS-EXAMINATION.

THE WITNESS: I do not know how many packages to a case now of Niagara Falls Shredded Wheat. We do not sell many now. The National Biscuit Company sells it all direct to our customers, the delicatessens. It was, I believe, at one time, packed thirty-six to the case. I have not seen any lately. We only have a few on hand, unless once in a while one of our customers asks for it. We have a case of Shredded Wheat on hand to send them. Very little is distributed through wholesale grocers.

We have some Kellogg's Whole Wheat Biscuit in our store. The Kellogg product looks like a shredded wheat biscuit. There is a difference in size. It looks the same as Shredded Wheat. Since the Kellogg product has been on the market, I understand there are two different manufacturers producing shredded wheat biscuit: Kellogg and the Niagara Falls people. The Kellogg people have sold their product that was in my warehouse, by their specialty salesmen; through just what channels I do not know.

RE-DIRECT EXAMINATION.

THE WITNESS: I would not sell a package like Defendant's Exhibit 6 as Shredded Wheat. I would ask the customer what she wanted. If a customer asked for Shredded Wheat, I would know what they wanted and give them the Niagara Falls Shredded Wheat.

I have seen the Kellogg biscuit today, but not before. It is similar to Shredded Wheat, except in size. Otherwise, it looks like Shredded Wheat, only I think it is a little browner than Shredded Wheat.

RE-CROSS-EXAMINATION.

THE WITNESS: If a customer asked me for Kellogg's Shredded Wheat, I would send her the Kellogg biscuit.

JAMES T. McKINNEY.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer in Brooklyn and have been in that business just forty years last April, all the time in the Flatbush district, a service grocery, with charge accounts, telephone orders being about 75 per cent. of our business.

I recognize Plaintiff's Exhibit 1. It is Shredded Wheat. In 1905, I think we had our first convention at Niagara Falls in the Shredded Wheat Building. We handled Shredded Wheat before that time. I was established in 1892. That is about the first product we had. It is a lifelong article, you know. We have handled it probably as long as it has been on the market.

When customers ask for Shredded Wheat, the only thing they can ask for is this package, like Plain-

tiff's Exhibit 1, that they expect to get. If a customer telephones and asks for Shredded Wheat, we send her Shredded Wheat, never anything else. The expression shredded wheat has, of course, a definite meaning with the purchasing public. My own mother used it, and my wife uses it. We use it in the home, for breakfast. People have been to Niagara Falls and have seen this Shredded Wheat made. They come back and say, "Gee, that is the finest thing I have ever tasted. I have seen it made. We will have some of it. Is that Shredded Wheat? Yes." That is the way some people feel about it. The advertising, of course, that you put forward there, made a sale for it, like all cereals. To my knowledge, Shredded Wheat has been extensively advertised.

With Defendant's Exhibit 6 held so I can see the picture on it but not the name, I would say that looks something like Shredded Wheat. I remember Plaintiff's Exhibit 10, with the dish on the end of the carton, somewhat similar to that. I think that would have been on there all the time, as far as I know, one side Niagara Falls and the other side Shredded Wheat in that plate.

I do not handle Kellogg's Whole Wheat Biscuit. I never saw it until today. I saw the biscuit. It resembles Shredded Wheat exactly in appearance, except in size, I would say.

CROSS-EXAMINATION.

THE WITNESS: We do have whole wheat flat biscuit in the shape of saltines. Uneeda Biscuit, the soda crackers, are called biscuit. The name Whole Wheat Biscuit, in itself, would mean nothing to me, unless I saw a picture of what was meant by that particular whole wheat biscuit. As a rule, most of them have a picture of the cracker on the package, something like Shredded Wheat.

If I had never seen Defendant's Exhibit 6 until today, I would have no idea at all what Kellogg's Whole Wheat Biscuit looked like. It would be what might be called a blind package. I would have to open it up to see what was in it. That is the way I feel about it. If anybody told me the biscuit in the package was a shredded wheat biscuit, I would know what it would look like. I would imagine it would look like the Shredded Wheat Biscuit, that pillow-shaped biscuit that looks as if it were made of shreds, the way I have seen it made in Niagara Falls, the way I have seen it in the package, the way I have eaten it. That is the only way it comes. I do not know any other way. I do not know any other name that would describe it than shredded wheat biscuit. I have never seen it any other way. I am not able to suggest another name.

FRANK H. NEWS.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a retail grocer, have had my own store for the past three years. Before that, I was in Bohack's seven years. That was my entire experience as a grocer. I recognize Plaintiff's Exhibit 1. That is what I would call real Shredded Wheat, with which I have been familiar for the past fourteen years, because I went through their plant the time I was married, and I ought to know. I took a trip to Niagara Falls. When I said that is real shredded wheat, I understand these other wheat biscuit came out and were supposed to be the same; but I do not believe they are.

I have had Kellogg's Whole Wheat Biscuit in the store one time about eight or nine months ago. I got rid of it; but it took me a long time. I just put it down

and got rid of it that way. I did not give it to customers who asked for Shredded Wheat. They just told me to give them that biscuit up there, and I did. If a customer asked me to give him Shredded Wheat, I would give him the package with Niagara Falls and the building on there. A customer asks for Shredded Wheat, and I give him that package. That is the only package I ever knew for Shredded Wheat. My customers asked for Shredded Wheat. When I gave them Shredded Wheat, they never brought it back.

JOSEPH WISHNIE.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION..

THE WITNESS: I am a retail grocer, in business about fifteen years, of which the last four years was for myself. My store is cash-and-carry. I recognize Plaintiff's Exhibit 1 as Shredded Wheat, with which I have been familiar ever since I have been in business. When a customer asks me for a package of Shredded Wheat, I give her Shredded Wheat with Niagara Falls on it. We never carried anything else.

I am familiar with Kellogg's Whole Wheat Biscuit. We never carried it; but a man came around in a little flivver and tried to sell it. We told him we carry nothing unless a customer calls for it, for the simple reason that, if we carried everything, we would have to have a department store like Macy's. If they call for it, I can order it for the jobber. I never got a call for it. /

If I saw a package like Defendant's Exhibit 6 and saw just the picture on it with the name obliterated, I would say Shredded Wheat was in the package.

CROSS-EXAMINATION.

THE WITNESS: If they asked for Kellogg's Shredded Wheat, naturally, I am in the business to make money, and I would sell them that. If I carried Defendant's Exhibit 6, and the customer said, "I want Kellogg's Shredded Wheat," I would give her the package, if she asked for it. She would have to say Kellogg's. If she said Shredded Wheat with the Niagara Falls on it, I would give her that. If she said Kellogg's Shredded Wheat, I would understand she wanted Defendant's Exhibit 6, naturally.

I understand there are two concerns making shredded wheat: Niagara Falls, and Kellogg. So I see, the way you brought it down to me.

RE-DIRECT EXAMINATION.

THE WITNESS: If a customer asked me for Shredded Wheat, I would give her the one with Niagara Falls on it, because I know what it is. I eat it myself.

RE-CROSS-EXAMINATION.

THE WITNESS: I have never eaten the Kellogg product.

ALLAN H. FAGAN.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a structural steel erector, construction man. I am familiar with the product known as Shredded Wheat and have been between twenty-five and twenty-eight years. I come from Niagara Falls, Canada, where it is made. I was through the American Shredded Wheat plant about fifteen or twenty years

ago. I have also been through the Canadian plant and have seen it going through the process. I have been a user of Shredded Wheat, but use it now only once in a while. If I go to a grocery store and ask for it, I expect to get the National—what they called the Shredded Wheat before the National took it over.

In a restaurant in Newark on the twenty-ninth of December, 1932, I asked for Shredded Wheat, at the Waldorf Restaurant, 738 Broad Street. I went in there, had breakfast, asked for Shredded Wheat, and the waitress served me one of those small packages, which I believe has two shredded wheat in it. I said "This is not Shredded Wheat." She said, "It is." I took it and ate it. I brought the carton away with me. Here it is. Plaintiff's Exhibit 140 is the carton served to me in that restaurant. Up to the time I had this experience, I had never seen the product known as Kellogg's Whole Wheat Biscuit, and I was not familiar with it.

CROSS-EXAMINATION.

THE WITNESS: The Kellogg product was brought to me in the carton. After I ate it, I had no further discussion with the restaurant people, did not try to tell them any more it was not a shredded wheat product. I could not say there was any difference between it and shredded wheat made by another concern. I did not notice any. As soon as the little package was handed to me, I knew right away it was not Niagara Falls Shredded Wheat, by the box. When I took the biscuit out of the carton I noticed it was a small biscuit.

ALEXANDER AITKEN.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I will be fifty-two this month. I am a retail grocer, and I have been engaged in the grocery

business all my life, never did anything else. I was born into the retail grocery business. During the conduct of my retail grocery business, I have had occasion to sell Shredded Wheat Biscuit for quite a number of years back, at least twenty-five years, during which time I have handled the Niagara Falls Shredded Wheat Biscuit in my store all the time, like the package marked Plaintiff's Exhibit 1, which I have picked out from among those on the table.

I know the package of the Whole Wheat Biscuit put out by the Kellogg Company, and the size of it. The biscuit is smaller in size, although I have never eaten it. I know quite a few people who come in contact with it and do not want it, because it is not the kind of biscuit they have been acquainted with, the Niagara Falls biscuit.

The biscuit just taken from Defendant's Exhibit 6 is, I think, the Kellogg biscuit to which I have referred. That is it. The Niagara Falls biscuit is a larger biscuit. As to taste, I would not swear, because I, personally, have not eaten it. I think it is quite different in form and appearance. It is a little longer biscuit. The Shredded Wheat Biscuit is a shade longer than the Kellogg biscuit. It seems to me the Kellogg biscuit is a little higher and the Niagara Falls is flat. They are both substantially pillow-shaped. When people come to my store and ask for Shredded Wheat, they have in mind Niagara Falls Shredded Wheat.

I have been familiar with the picture of a dish with biscuit in, as shown on Plaintiff's Exhibit 10. If I saw that representation without any printing, I would think it was Niagara Falls Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: Within the last month I have known there are two different manufacturers of shredded wheat, the Kellogg Company and the Niagara Falls

people. That is the first I had known there was another shredded wheat on the market. A representative of Kellogg came into my store and wanted to sell it to me from the wagon. I refused to take it in.

Assuming I had never seen Defendant's Exhibit 6 before, with the illustration of the plate concealed, just seeing the words Whole Wheat Biscuit, that, in a way, would not say anything about it, unless I would see what sort of diagram these packages carry. If I would carry a package, I would want to know what was inside. Whole Wheat Biscuit might be one of six or eight different kinds of products, a flat biscuit, a pillow-shaped biscuit, or a rosette-shaped biscuit, to me. If, however, the package carried the name Kellogg's Shredded Wheat Biscuit, I would expect to find shredded wheat. I would know it was shredded wheat; meaning, by that, a pillow-shaped biscuit made out of wheat in shredded form.

The term Niagara Falls has always been very actively advertised in connection with Shredded Wheat since I first saw it. You see a picture of Niagara Falls in a great many bill posters that advertise it. It says specifically on it: The Home of Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: I refused to take Kellogg's Whole Wheat Biscuit from the salesman, because, in all my experience in the grocery business, I did not want to have any shelf-warmers. I want them to go out of that store, so I can utilize whatever money I have in them somewhere else. I cannot do that, if I have it on the shelf. That is the only reason I refused to have it in my place.

RE-CROSS-EXAMINATION.

THE WITNESS: If customers asked me for Kellogg's Shredded Wheat, I would stock it, but I am afraid they

would have to ask me more than three or four times for it. If they asked for it in large enough quantity, I would. We must not forget that, if a woman came in and asked for Shredded Wheat, and if I gave her a package of Kellogg's biscuit and she brought back even one package of it and told me she did not like it, I would take it and ship it back to Kellogg immediately at their own expense. I would refuse to keep it in my store.

RE-DIRECT EXAMINATION.

THE WITNESS: I would say the term Shredded Wheat as well as the picture of Niagara Falls, has been advertised very extensively. I am a great fellow, going along, you know, to see the placards in the bus or railroads. That is what I am going by. I see Shredded Wheat, The Home of Shredded Wheat, a picture of Niagara Falls, the waterfall there.

MRS. IDA MUND.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I reside in New York City. I am familiar with the food product known as Shredded Wheat and have been for a considerable period of time.

I attempted to make a purchase of Shredded Wheat and another product was handed to me, November 30th of last year, at the store of Mr. Klee, 279 East Thirty-ninth Street. I went there and asked for Shredded Wheat. Plaintiff's Exhibit 141, the package of Whole Wheat Biscuit, was handed to me as Shredded Wheat. That is my signature on the package, by which I identify it as the package I purchased.

One of the National Biscuit Company salesmen who knows my husband asked him to send me to make

this purchase. . My husband told me to ask for Shredded Wheat and to take whatever was handed me as proof of what he sold me for Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: That store is in my neighborhood, but I very seldom go there. That is the first time I asked for Shredded Wheat there. My husband asked me to go just to that one store. I asked the grocer if that was real Shredded Wheat. He told me it was just as good but put up by another company. He did not tell me it was Shredded Wheat. I asked him if it was real Shredded Wheat because he gave me this package, which I do not regard as Shredded Wheat. Plaintiff's Exhibit 1 is the only package of real Shredded Wheat.

He said right away it was not the Shredded Wheat, but it was put out by a different company. I was not asked to and did not go to any other store. I never had this happen anywhere else.

SAMUEL A. LEONARD.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am seventy-five. I know of Shredded Wheat. I have had it in my home from time to time. I recently went to the store of V. Pettrolala, Belleville, New Jersey, and said: "I would like to have a box of National Biscuit Shredded Wheat." He was standing behind the desk. In back of him there was a well-dressed fellow, Italian, and he began to look around. My son, who was with me, said he did not have any in the place. The fellow who stood on the opposite side of the desk said: "Right up there." He said,

"Oh, yes," and pulled down one of these Whole Wheat packages.

I said, "That is not the National Biscuit, is it?" He says, "Yes." "Well," I said, "it does not say so." Well, he says, "It is Shredded Wheat." "All right," I said, "I will take a box of it."

I think that was Wednesday of last week. My son, who is a salesman out there at that place, took the package down to Mr. Ehrlach. It was the same package as Defendant's Exhibit 6. I went to the store at the request of my son, who is connected with the National Biscuit Company. That is the only store I went to. I asked for National Biscuit Company's Shredded Wheat and received a package like Defendant's Exhibit 6, took it away with me, and delivered it to my son. The date was on the package. I do not have the package with me. I did not visit any other store.

CROSS-EXAMINATION.

THE WITNESS: The grocer said it was National Biscuit. When I pointed out to him that the National Biscuit name was not on it, he said it was Shredded Wheat. He said just that it was Shredded Wheat, not anything about it being made by another manufacturer. I said, "That is what I want. I will take it."

I saw right away, when he handed me the package, that it was not Niagara Falls Shredded Wheat. I noticed the name Kellogg's on there. I did not open the package. I have used some of Kellogg Corn Flakes, but never used any of their shredded wheat; and I never used any of it since. I never saw any of it opened until today. There was one of them opened down there. They did not say anything about it.

RE-DIRECT EXAMINATION.

THE WITNESS: When I spoke to the storekeeper and told him this was not made by the National Biscuit

Company, all he said was it was the National Biscuit Shredded Wheat. I did not see any other man except this man who stood in front. It was a small store. There was a little fellow with him, a clerk, or probably his son. He did not want to wait on me. I think the proprietor of the store waited on me. In fact, I know it was, because my son had just been in there. He had his salesman's book. I met him on the next corner, and he said it was the proprietor.

JESSE W. PARNELL.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty years old, manager of the Hempstead branch for the Firestone Tire & Rubber Company. I am familiar with the edible product known as Shredded Wheat. I have eaten it for years.

At the restaurant of Otto Steiner at Hempstead, when I asked for Shredded Wheat and milk, he substituted Kellogg's. I told him it was not Shredded Wheat. He said it was just as good and the same as Shredded Wheat. I knew by the box, Niagara Falls, and he substituted this and called it Shredded Wheat to me. Plaintiff's Exhibit 142 is part of the package he handed to me, the upper part. The other part he took before I had a chance to take any more of it. I saw right away it was not Niagara Falls Shredded Wheat. He said it was just the same. I told him Shredded Wheat had a picture of Niagara Falls on it and that is what I wanted. This did not have a picture of Niagara Falls. There were two biscuit in the package. I ate one and brought one here. This is one of the two biscuit that were served to me as Shredded Wheat.

(Stipulated between counsel that the witness produced a Kellogg's Whole Wheat Biscuit.)

Quite often they have tried to substitute Kellogg's. I would not take it if I could purchase Shredded Wheat. It was substituted in this instance. He said he served me this as regular Shredded Wheat, that he sold it as Shredded Wheat. This occurred just two or three days ago. I went to that restaurant at the request of a National Biscuit Company salesman. I eat there regularly every day. He asked me if I ate Shredded Wheat. I told him I did. He told me to ask for some Shredded Wheat, some of his product. That is the only restaurant I went to and asked for Shredded Wheat, obtaining Kellogg's Whole Wheat, on that particular day. I remember it has been submitted to me quite often, not necessarily in this particular place but in more than one place. After this occurrence, I reported back to the salesman who asked me to make the purchase.

CROSS-EXAMINATION.

THE WITNESS: I never made a note of it in any other restaurant. I cannot recollect it to give you the name as sworn testimony. I might have been in lots of places but not know the names they were conducted under. I do not take particular notice of a place when I come out.

I knew right away this was not the Niagara Falls Shredded Wheat I have been getting, because I am used to noticing Niagara Falls on the box. The shape of the biscuit was different, because it was smaller.

RE-DIRECT EXAMINATION.

THE WITNESS: The Kellogg biscuit is a different type of biscuit, duplicated to the point the taste is not exactly the same. The shape is patterned after Shredded Wheat, only a smaller biscuit. As I see it, it is the same shape, except the Kellogg biscuit is smaller, because I am not in the bakery business and cannot find out.

C. WAYNE TUTHILL.

Deposition taken at New York, N. Y., January 4,

1933.

DIRECT EXAMINATION.

THE WITNESS: I am of mature age. I am familiar with the product known as Shredded Wheat. I have been through the factory and have eaten quite a lot of it. I have been familiar with it for about twenty years.

On the thirty-first of last December I went into an Italian delicatessen and grocery at Seaford, Long Island, and asked for some groceries. The last article I asked for was a package of Shredded Wheat. He says, "You mean Bisc'?" and I said, "Yes, the biscuit." He went to a shelf and handed me Plaintiff's Exhibit 143. That is my name on the package. He said, "This is all I have." I said, "No. Haven't you the other package of Shredded Wheat, the old package of Shredded Wheat?" He said, "That is coming in this afternoon. This is the same thing." I said, "If you haven't the other, I will take that." He said, "That is the same as the other," and handed me a package of Kellogg's Whole Wheat Biscuit.

I went to the store again yesterday. I had never eaten this kind, and I wanted to try it. I asked him if he had a package of Shredded Wheat. I wanted to see if he had the other. His wife, this time, got another package off the same shelf, with the same material. Yesterday, I got another package of Kellogg's Whole Wheat Biscuit.

Mr. Slocum, a National Biscuit salesman in our territory, asked me to go to that store and make this purchase. From my own curiosity, not because he told me, I went back to the same store and got another Kellogg package. He did not even offer me the original Shredded Wheat as I know it, which is manufactured in Niagara Falls. He evidently did not have it in the

store, referring to a package, like Plaintiff's Exhibit 1, with which I have been familiar for some considerable time. I am in the restaurant business. I have occasion to sell it sometimes. I carry Shredded Wheat there a package at a time, not in large quantity, because I am a buyer of National Biscuit products from the branch in Hempstead. To keep it fresh, we buy it in the store.

I never sold any Kellogg's Whole Wheat Biscuit in my restaurant. The first time I ever saw it was when I went to this Italian store of C. D. Gaetano. That is the first time I ever did know of it.

CROSS-EXAMINATION.

THE WITNESS: I ate the second package of Kellogg biscuit. I should say it tasted like Niagara Falls Shredded Wheat; but I think it was a little bit stale; because the edges were a little tough and did not dissolve like Niagara Falls Shredded Wheat. It may have been stale. Otherwise, I do not think I can tell the difference. I knew right away on both occasions that I was not getting the Niagara Falls package. The first time I said to the man I wanted Niagara Falls Shredded Wheat. I asked him if he did not have the original package. He seemed to know what I meant, because he said they were getting them in that afternoon.

WILLIAM JOHN BOHNET.

Deposition taken at New York, N. Y., January 4, 1933.

DIRECT EXAMINATION.

THE WITNESS: My business is meat and groceries, in which business I have been about fifteen years. We have had places in Amityville and Mineola. Twenty-five years ago, we used to operate one of the largest

places in Hempstead. We have another place at Roosevelt, Long Island, now.

During the time I have been in business, I have been familiar with Shredded Wheat of Niagara Falls. Picking out the package to which I refer it is right here, Plaintiff's Exhibit 1. I have been familiar with the shape and appearance of that particular biscuit for a considerable period of time, and have sold it in my store. When people call at my place of business or order Shredded Wheat from me, I understand they mean the Shredded Wheat they have been buying for years, with Niagara Falls on the side of the box. That is what they always look for. The kiddies say that, also the women. I have not visited the Niagara Falls plant.

A considerable portion of my orders are taken over the telephone, and people come to my store to place their orders. I do not handle any other whole wheat product. I am not in any manner familiar with any other whole wheat edible product. It seems to me there was a man around trying to sell me some biscuit like you hold in your hand. I had some on hand then, and I did not want any more. I asked him to let me see the biscuit, what it looked like. I opened up an original Shredded Wheat Biscuit, and I said, "How is it they have the same kind of biscuit as the original Shredded Wheat?" I do not remember what he said; but I knew there was a difference right there and then. Nothing was said about it, and I did not buy any. He has not been around to see me since. I do not know who he was or with what store he was connected. The package he showed me at that time was a tall square package like Defendant's Exhibit 6. The salesman opened the package and showed me one biscuit. I remember that, because I took one out of my stock, opened the biscuit, and compared them. I did see at that time that the Kellogg Whole Wheat Biscuit was a lot shorter than the Shredded Wheat. I thought it was Shredded Wheat Biscuit they had on there. I do

not know now or see what it is; but I remember it was shreds. I was wondering how they could work in conjunction with Shredded Wheat. Nothing was said after that. He discontinued the conversation after I started asking some questions about it. I did not know just what to think of it at that time. I thought it was quite strange they were putting out a biscuit like this one. I thought I would find out soon what it was all about. They never came around any more or tried to sell it, so I never asked any more about it. There is a difference between the two biscuit. One is larger than the other. The shape is generally the same, the thickness of it.

I think, in a lot of places, they can pass off Kellogg's Whole Wheat Biscuit for Shredded Wheat Biscuit, if they have it on hand and shove it over, saying it is the same thing. Some women are shrewd buyers. They can see right away or when they get it home that it is not the same thing. I think there is a possibility of a grocer passing it off one for the other.

CROSS-EXAMINATION.

THE WITNESS: For the time being a woman might take a Kellogg package, such as Defendant's Exhibit 6 and think she was getting a package like Plaintiff's Exhibit 1, being familiar with the latter, until she got home and saw it was not the same package. Assuming she looked at it when she got it, I think there would be a possibility of her taking the one package and thinking she was getting the other. A lot of people do not know of Kellogg's biscuit as it is put up there, as they do Shredded Wheat Biscuit. If I gave a lady one of Kellogg's, she would ask me what is the difference and how long the Kellogg's biscuit are going to be on hand. If I just had them in, I would say I had just got them. I would inform her that there are two kinds of shredded wheat biscuit.

MISS BESS EVANS.

Deposition taken at New York, N. Y., January 5, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am familiar with Shredded Wheat, have eaten it for years and years. I am familiar with its package. I identify Plaintiff's Exhibit 1 as a Shredded Wheat package. I had occasion to attempt to make a purchase of Shredded Wheat recently when something else was given me.

I went in a store, got some other groceries, and asked for Shredded Wheat. He said it was twelve cents a package. I told him there was a sale at chain stores, two for nineteen. He said, "We do not have sales. Here is a new shredded wheat on the market, twelve cents, just the same as Shredded Wheat, and I really like it better. Won't you try a package?" I said, "I do not know. I think this is an imitation." I purchased this package, Plaintiff's Exhibit 144, last Friday, December 30, 1932. The name of the store is written on there, Midtbo, on Forty-second Street, Brooklyn. I think he is German. He said it was just the same as Shredded Wheat, and I purchased it.

I went to that store at the request of Mr. Dunton, a representative of the National Biscuit Company. I was employed two Saturdays demonstrating Shredded Wheat for the National Biscuit Company in June, I think, at Rogers Avenue and Lincoln Road. I said to Mr. Midtbo, "Where is your Shredded Wheat?" When he first said it, he had Kellogg's out there. He had the other back. He said, "Why don't you try this? It is the same thing and I really like it better."

I was just a demonstrator two days for Shredded Wheat; but I have been a demonstrator for the A. & P. before they broadcast, for months, three or four days a week, about a couple of years ago.

During the time I have been purchasing Shredded Wheat, I have been familiar with the form of the biscuit. I would know a Shredded Wheat Biscuit by its form, also by the package in which it is contained. I have not eaten any of the Kellogg biscuit which I purchased, yet, I had two boxes of the other shredded wheat given to me by a neighbor who was going on a vacation. I thought I would eat what was good. I did not know anything about the other.

The biscuit you hold before me (taken from Defendant's Exhibit 6), looks like an imitation to me, because Shredded Wheat is much longer than that. I would not say that the form of the Shredded Wheat Biscuit and the Kellogg biscuit is the same except as to size. It looks like an imitation. It does not look like Shredded Wheat to me. Shredded Wheat is longer.

During the time I have been demonstrating, I have been familiar with names on different articles of merchandise that have been sold. The names applied thereto have value in identifying the products. I have demonstrated, for instance, Mazola Oil. I have seen other articles demonstrated which were identified by trade names. I demonstrated a tooth brush copied from another product. We had trouble with it because it was an imitation.

It is my experience and observation that, when people call for or desire Shredded Wheat, they desire the product of a particular concern. When a person gets used to a product and it has been used for years and years, if they put something like it on the market, it is an imitation. You know it does not come up to the original product. I have purchased and eaten Shredded Wheat twelve or fifteen years. I suppose since it has been out. The first time I knew of the Kellogg Biscuit as in Plaintiff's Exhibit 144, I had seen it occasionally on the shelf in a store but never

paid any attention to it; just like My-T-Fine or some other product you would not care to use.

CROSS-EXAMINATION.

THE WITNESS: As soon as I saw the Kellogg package, I certainly knew it was not the Niagara Falls package I had been buying. They told me it was the same thing. You would be surprised just the two days of demonstration my sister and I did for just two Saturdays, to see how many cases of Niagara Falls Shredded Wheat it sold, also to know how many people we told about Shredded Wheat who had not been using it or had not known about it before and get it now. I am two years out of a hospital for an intestinal trouble operation, and Shredded Wheat has made my health very much better. There were many people we found who had heard of it but they would not eat it because they thought it was like hay or straw. You would be surprised at the people who buy it in our neighborhood. My sister and I are never without it. If I am out of it in the morning, I get dressed right away and go around the corner and get it, because I have to eat it every day. Those people we introduced it to said they did not know about it. They ate other cereals before. If we spoke so highly of it, they would try it out.

I personally never knew of Kellogg's Shredded Wheat before, except I got a box of it to try. Then a friend of mine went off for a week-end and gave me two boxes of National Shredded Wheat. I thought well, we know what this is and we will eat it first. This was the first time a grocer ever tried to introduce a new product to me by saying it was the same kind as the old product but made by a new manufacturer. I never had a grocer say, "We have got a new make of the old product," because I have been buying at

chain stores. They very seldom introduce anything, except something of their own they want to push. In the old type grocery stores, I know they will often introduce new products by saying it is a new manufacturer in the field and they think it is a good product and they would like me to try it.

I suppose I will eat the box of Kellogg biscuit I have. What is the use of trying it out? There is Royal Pudding. They have another lower priced. They cannot even get me to try it. I will not even taste it. My sister and I do southern pastry cooking by order. We do not do much right now, because people will not pay the price. My prices are like Schraffts'. When you have a good product and know how to cook them, you know what they are, and you know what an imitation is, too. You can make a delicious cooked cereal out of Shredded Wheat with just warm water and cooking, if you like it warm.

The National Biscuit Company representative did not repay me for this package. I just brought the package in there and gave it to them for nothing. I made the purchase in that store; and the man told me it was the same thing and he really liked it better. The National Biscuit salesman, Mr. Dunton, really did ask me to make the purchase and expected me to let him have the package. I went to one other store, asked for Shredded Wheat, and got the Niagara Falls product. He told me to go to that store, too.

RE-DIRECT EXAMINATION.

They had Kellogg's at both stores. At Dutson's store, the second store, they had both Shredded Wheat and Kellogg's Whole Wheat. I asked for Shredded Wheat. I said, "Aren't you having a sale? The chain stores are two for nineteen." He said, "No, they are twelve cents." I said, "Give me a box." He said;

"Why don't you try this Kellogg's? Do you want to try it?" I said, "No." He said, "It is just the same thing," so I bought the package.

I paid twelve cents for that one and ten for the other. The package I got at Dutson's was like Plaintiff's Exhibit 144, which I purchased at the first store where they told me they did not have sales. At the second store they had both products, and he told me did run sales. I purchased the Kellogg product at a less price than I could have purchased Shredded Wheat, which was twelve that day, and he sold me that package there for ten.

RE-CROSS-EXAMINATION.

THE WITNESS: Both the grocers made the same explanation about its being a new product and they would like to have me try it. One man said it was the same thing, and he really liked it better.

NORA G. EVANS.

Deposition taken at New York, N. Y., January 5, 1933.

DIRECT EXAMINATION.

THE WITNESS: I have given my name and address. I am familiar with the food product known by the name of Shredded Wheat and have been familiar with it for at least fifteen years. I eat it every morning and sometimes at night. I have purchased it myself. I am a sister of Miss Bess Evans who testified a few minutes ago.

I have ordered Shredded Wheat in restaurants. I recently had an experience in ordering Shredded Wheat and obtaining something else. I went into a cafeteria and ordered Shredded Wheat. They brought

this Whole Wheat and fixed it in ~~the~~ bowl, where it looked like a long biscuit. I said, "That does not look like Shredded Wheat to me. Bring me the box. I want to see." She did not bring the box. I suppose she told a story and she did not want to get caught. After I tasted a little bit, I said "Bring another one and bring the box with it." She brought the box. I said, "That is not Shredded Wheat. That must be a new biscuit that is put out. I never saw it before." She said, "It is just the same." I said, "You are mistaken. It is not." This was at The Meadow Cafeteria, 72 Henry Street, Brooklyn. With me then were my sister, Miss Bess Evans, and Mr. Dunton, who is connected with the National Biscuit Company. It was at luncheon time. Mr. Dunton asked me to go to this restaurant. I placed the order with the waitress. I said, "I want an order of Shredded Wheat Biscuit." She brought this Whole Wheat Biscuit. I did not know what it was at the time. She had it in a bowl. It looked just like the original Shredded Wheat. She did not bring the original container I called for. I ordered another order of it, and then she brought another container, which I have produced here, Plaintiff's Exhibit 145. I ate part of one, and the other biscuit is in there. The biscuit I first had and this are the same biscuit.

(Stipulated that the biscuit produced by the witness is a Kellogg biscuit.)

I never have made any other purchases of Kellogg's Whole Wheat Biscuit. I never used it. I always use the other, the Shredded Wheat.

I did not like the Kellogg biscuit in the cafeteria as well as the Shredded Wheat, because it seemed harder than the other and did not seem to me to have the same flavor.

I demonstrated Shredded Wheat for the National Biscuit Company for just a short time in Brooklyn, in

the A. & P. and in Wamselles', in Flatbush; just two days, in June, 1932. Before I demonstrated Shredded Wheat for them, I was familiar with their product. That is why Mr. Dunton wanted us to demonstrate it; because we knew Shredded Wheat and knew what it does for you. I feel it is a good, edible product and it does the system real good. It is wonderful. I eat it every day, and sometimes at night. When I feel I need a laxative, I take Shredded Wheat instead, and it is marvelous. My sister has made demonstrations of products for other stores. I have not. When I order Shredded Wheat in a store, I expect to receive Shredded Wheat, the original kind. If I received the other, I would send it back. I always use the same brand of everything. From my experience, the name of a product has importance, because people would say: "What kind of Shredded Wheat is that?" I would say, "The original, with Niagara Falls on it." A lot of people feed that to their children. If you use Pillsbury's Flour, for instance, you would not use any other brand. I use Royal Baking Powder and would never use any other, no matter what people told me. I have always used that, and I think it is the best. When I go to a store, I ask for Royal Baking Powder. Sometimes they put out Davis, which is a cheaper brand, the same size. They tell me that. I do not take it, because I think Davis does not have cream of tartar but some stronger chemical.

CROSS-EXAMINATION.

THE WITNESS: I tried Davis Baking Powder, but I did not like it. I had it in somebody's else house. I do not use it. I do not like prepared flour, because I think it is not nearly as good for baking. I use Swans Down Flour for cakes. I do not know what other baking powders have, but it is not light like Royal, and

it makes the cake heavy. I tried Presto, but it is heavy and I do not like it. I very seldom try anything new, because I like standard kinds and brands of things that are all right. I do not use anything but standard kinds of cereals. I do not like corn flakes, or Rice Crispies. I do not like anything new. I have tried them, eaten them in different places. I meet people who have them. I always have Shredded Wheat. I always have it. It is really a meal when you eat it. When I have Shredded Wheat for breakfast, I have a real meal there. That and a piece of toast is about all I eat. I am typical, in that I do not like new things and I like old things. I have tried different things at other people's houses, sort of by accident. If they bring you a certain cereal, naturally, you are going to eat it. A great many people, however, do like to try new things. I do not. I want to go and order what I know about. I use a certain brand of coffee. I like the old brand, and I do not try new. What is the use of taking something you do not know what you are getting, if you have something you are satisfied with. I do not recall any instance of trying a new product, finding it better and being glad I changed. I use Gold Medal Flour and Swans Down Flour for cakes. I used Presto, but I did not like it.

When I saw the Kellogg biscuit in the plate, I knew right away it was not Niagara Falls Shredded Wheat, as soon as I saw the package. I thought it was a sample. Shredded Wheat looks the same. I thought it was a sample when they brought it. I knew I had not seen any of the samples of Shredded Wheat they put out except the original size. That is why I knew it was not the same thing. When I saw the outside of the little package with Kellogg on it, I knew it was not the original Shredded Wheat, not the trade mark.

RE-DIRECT EXAMINATION.

THE WITNESS: They had a menu at the cafeteria when I was there. Here it is, Plaintiff's Exhibit 146, last Friday. It says Shredded Wheat, milk, ten, meaning ten cents. It was not Shredded Wheat at all.

I am familiar with the shape and form of Shredded Wheat Biscuit. When she brought the package, I thought it was a Kellogg sample, because I knew the samples of Shredded Wheat when I had demonstrated were larger than that. When the dish with two biscuit placed end to end was before me, I did not at that time know that Kellogg was putting out a Whole Wheat Biscuit. I asked for Shredded Wheat. I would say the Kellogg biscuit is substantially the same as Shredded Wheat, except as to size. It does not seem as fine as Shredded Wheat. It is coarser. The shape is just the same.

RE-CROSS-EXAMINATION.

THE WITNESS: As soon as I came in contact with the Kellogg biscuit, it is fair to say I knew there are two shredded wheat biscuit on the market, one made by the National Biscuit Company, and one by Kellogg. In ordering shredded wheat from now on, I would specify whether I wanted the Kellogg or the Niagara Falls product. When I demonstrated on Shredded Wheat, I had a great number of people who had never tried the Niagara Falls product, and who, through my demonstration, I succeeded in getting to try it.

JOHN F. L. MCCRUM.

Deposition taken at New York, N. Y., January 5, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am thirty-five unemployed at this time. I was with a Wall Street broker's house. I made

a visit recently to a store and asked for Shredded Wheat, at 222 Rochester Avenue, near St. John's Place, Brooklyn. I received a box of Kellogg's Whole Wheat Biscuit, Plaintiff's Exhibit 447. I went into the store, asked for a small can of evaporated milk and a box of Shredded Wheat. He put them in a bag and handed them to me. The grocer did not say anything to me. I went to the store at the request of Mr. Dunton, of the National Biscuit Company. After I had made the purchase, I told him about it.

CROSS-EXAMINATION.

THE WITNESS: I saw the package he took down from the shelf, that it was a Kellogg package, when he put it on the counter. I recognized then right away it was a Kellogg package. I have been eating National Biscuit Shredded Wheat, and I was familiar with the appearance of the package of Niagara Falls or National Biscuit Shredded Wheat. I knew right away, when I looked at it, that it was not the package the grocer was handing down to me. I did not ask him anything.

Mr. Dunton had asked me to go to that particular store, ask for Shredded Wheat, and take what was given to me. He gave me a list of two other stores, but I had no trouble there. They handed me the right National Biscuit Shredded Wheat. I have never tried Kellogg's Shredded Wheat. I never had heard of it before. I do not know now there are two kinds. The only one I ever heard of was National Biscuit Shredded Wheat. I did not open this package to find out whether there was any shredded wheat in it. Looking at the contents of Defendant's Exhibit 6, I really could not tell you whether that looks like Shredded Wheat. It does not look like the National Biscuit Shredded Wheat. Now that you show it to me, I can see that it looks like

Shredded Wheat Biscuit. It is hard to say if it looks like the National Biscuit Company's Shredded Wheat Biscuit. I could not tell you. All I know is that there is one National Biscuit Shredded Wheat. I do not know whether the Kellogg biscuit is shredded wheat or what it is. I cannot tell by looking at it. It does not look to me like National Biscuit Shredded Wheat. The three stores I have testified about were the only ones Mr. Dunton told me to go to and were the only three experiences I have had in buying Shredded Wheat.

RE-DIRECT EXAMINATION.

THE WITNESS: Plaintiff's Exhibit 1 is the Shredded Wheat Box with which I have been familiar.

GEORGE OLIVA, recalled.

Deposition taken at New York, N. Y., January 5, 1934.

FURTHER RE-CROSS-EXAMINATION.

THE WITNESS: Plaintiff's Exhibit 148 is one of the new cartons of plaintiff. The phrase: It's All In The Shreds is still used on some of the cartons of the plaintiff company. I cannot say why it is not on all. That is the latest carton that was put out for the large or grocery-store size. It has been left off, for no reason I know of. I presume I left it off. I would say I took the initiative. I left it off. I had no reason for leaving it off, only that whole panel was left off. It happened to be on that panel.

The French carton indicated, made in the Canadian Home of Shredded Wheat, approved by the legal department 5/9/30, does not carry the phrase. The Canadian carton for the French trade carries it, but we left it off this one. This carton, approved by the legal de-

partment 4/30/30, carries the phrase: It's All In The Shreds. That carton is still in use to the restaurant trade, lunch rooms, and drug stores, individual cartons.

It is the policy of plaintiff company to foster and push and encourage the sale of individual cartons in the restaurant and lunch-room trade. It is doing everything it can to promote the sales of them. I would not say it is doing anything to hold them back or discourage the sale of them. I do not know any reason why they should. Those cartons are pushed, pressed, and promoted in every way to get every restaurant and hotel that wants to handle their biscuit that way to handle and serve them in individual cartons. It is to our interest to carry that advertising material on the carton right through to the consumer, to have that carton go with the name Niagara Falls and: The Home of Shredded Wheat on it, right on through to the ultimate consumer.

It is served in different ways. Most hotels serve them loose. We sell to the hotel trade with the idea they will use them in individual cartons. Some of them take them out of the carton, quite a few of them. We have no way to persuade them to stop doing that, except through our selling force, which, as a whole, is out to promote the sale of individuals in that trade.

The carton marked Approved by legal department June 19, 1929, carrying: As Made Since 1893, and: It's All In The Shreds, is not now in use. It was discontinued, I should say, about two or two and a half years ago. This carton approved April 30, 1930, replaces that, to the best of my knowledge, and omits the two phrases: As Made Since 1893, and: It's All In The Shreds. I took them off. Evidently, it was approved with them off. I wanted to repeat Niagara Falls on both ends, not to make a double emphasis on Niagara Falls, but to make it uniform, one side to look like the other. In doing that, I chose Niagara Falls rather than

the two-biscuit plate. That led me to put on both ends: The Home of Shredded Wheat, Niagara Falls. Since April 30, 1930, that type of carton for the grocery trade has had those two pictures of Niagara Falls, one on each end.

We also represented on this carton of April 30, 1930, the big biscuit partly covering the front face of the factory; and, on the rear face, the expression: As Made Since 1893. We also left off that carton the reference to twelve ounces and twelve biscuit which had been on the previous carton. It was later put back again, although I do not remember why. I believe it was because of the requirements of Federal laws to state the weight and number of the biscuit.

The carton approved March 27, 1931, a Canadian package, has the Twelve Biscuit in relatively small type at the bottom of the face of the carton. On the American carton of the same date, it is just in connection with the name, twelve biscuit; with no reference to ounces.

The carton marked C. A. V. August 28, 1931, contains a reference to Twelve Biscuit and Twelve Ounces; and the copyright notice was changed from 1929 to 1931.

The British carton, marked originally as approved 4/21/31, then marked not approved, contains on one panel the words: One Dozen Original Shredded Wheat, a picture of a plate containing two biscuit; under that: Shredded Wheat (nothing added, nothing taken away) It's All In The Shreds. That language is still used on that British carton. They are made at Welwyn Gardens in England. The only place on the American or Canadian cartons where It's All In The Shreds is now used is on individual cartons.

On carton approved 2/26/32, appear on both end panels, under The Home of Shredded Wheat, the In-er-Seal trade-mark of Uneeda Bakeries. That is still used on present cartons, and we put down as manufacturer

of the product, National Biscuit, and, under that, Uneeda Bakers, Twelve Biscuit, Twelve Ounces. The phrase: Twelve Full-Sized Biscuit is used in display advertising, on some car cards, along with Niagara Falls.

On the cartons which carry the 'Uneeda Biscuit In-er-Seal trade-mark, we put prominently on the face, opposite the face which has the factory picture, the phrase: Shredded Wheat Bakeries, Niagara Falls, New York, Oakland, California, The National Biscuit Company, Uneeda Bakers. There have been no changes in the signs on the Niagara Falls factories. It is still called The Shredded Wheat Bakeries.

The two cartons to which you refer, stamped legal department received June 15, 1932, are Canadian cartons, with reading matter on one of them for French Canada. The others are used, one in English Canada, and one in French Canada; although some of the English are also using some of the French Canadian, in the Quebec territory. Those Canadian cartons do not have the In-er-Seal trade-mark, nor do they carry the phrase: Shredded Wheat Bakeries, National Biscuit Company. The name there is Canadian Shredded Wheat Co., Ltd. So, at present, the biscuit, on opposite sides of the American-Canadian line, are being marked in Canada by The Canadian Shredded Wheat Co., Ltd., Niagara Falls, Ontario, Canada; and, on this side of the line, under the name: National Biscuit Company, Uneeda Bakers.

The sample carton marked Approved 8/18/32 does not contain the phrase: It's All In The Shreds. That is distributed from house to house in the United States.

The other two cartons on the same page, both approved 6/14/32, contained in the same place on the end panels the term: As Made Since 1893, and the phrase: It's All In The Shreds. Those are used in sales to dining cars, restaurants, and for individual service in

general. There is no other difference between the sample cartons and the individual cartons, that I know of.

I do not know why the sample carton has merely: Made Since 1893, and the individual carton has also: It's All In The Shreds, unless it was just to fill out.

The last carton is Plaintiff's Exhibit 148, which, as far as I know, has been approved by the legal department as a United States carton for the regular grocery trade. On the end panel is: The Home of Shredded Wheat, Niagara Falls, and, under that: The National Biscuit Company, In-er-Seal mark, slightly differently arranged from prior cartons; the words run together; and the National Biscuit name, instead of between Shredded Wheat and Niagara Falls, is under: Niagara Falls. That was done just to improve the design. This carton is the first grocery trade carton in about two years with the dish with two biscuit in it. We put that on the back face of the carton with the words: Trade mark, Reg. U. S. Pat. Off. At the bottom is: All the Bran and the Wheat. Elsewhere on the carton we have: One hundred per cent. Whole Wheat, and: Nothing added, nothing taken away, and: A hundred per cent. Whole Wheat, all the bran and other food substances. We have not emphasized it. It is all copied on the back. It was just put in that way for a layout. That is part of the message; but there are other messages on there also important.

Under the biscuit, on the front face, we have rather prominently: One hundred per cent. Whole Wheat. It is fair to say that the five or six features on there of the name Shredded Wheat, the picture of the factory, of the biscuit itself, and the phrases: The Home of Shredded Wheat; under that: Twelve Biscuit, Twelve Ounces; and, under the picture of the biscuit: A Hundred Per Cent. Whole Wheat, are the features we have given to the front panel of that carton.

RE-DIRECT EXAMINATION.

THE WITNESS: The Company has absolutely not ceased or cut down its efforts to sell its Shredded Wheat in packages containing twelve biscuit. It sells all the individual biscuit it can, and, when they are sold to lunch rooms or elsewhere, there are no strictures on the benefit purchaser that they must take it to the table of the consumer in the package. That is a matter of choice for the lunch room keeper. The company does not endeavor to get any advertising that way, having the carton brought to the table of the consumer with the biscuit in, and the company has neither issued any strictures in regard to it nor offered propaganda in any way whatsoever as to that.

RE-CROSS-EXAMINATION.

The company has no control in the restaurant, as to whether biscuit are served to the consumer in or out of the carton. All it does is supply the biscuit in individual cartons. That is where the control ends, so far as how the biscuit is going to be served is concerned.

The biscuit are not served in individual cartons in our own restaurant here. I do not know what carton they come out of; but they are not served in the carton in the restaurant itself.

MICHAEL WEINSTOCK.

Deposition taken in New York, January 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am in the wholesale grocery business of A. Krasne, 845 East One Hundred and Thirty-sixth Street, carrying a full line of groceries wholesale.

We cover a territory of Brooklyn, New York, Long Island, New Jersey, up-state New York and New England. We employ ninety-eight salesmen and have twelve thousand customers, being one of the largest wholesale grocers in New York.

I recognize Plaintiff's Exhibit 1 as a Shredded Wheat package. I have been familiar with Shredded Wheat ever since I was a youngster. We carry it now and have done so for fifteen years.

In the trade, the expression "Shredded Wheat" has the significance of a trade name, as to a particular product of particular origin. The way I understand it, it is an item that has been named as Shredded Wheat, and the name has been registered. That is my understanding of the meaning of the expression Shredded Wheat in the minds of the purchasing public. Shredded Wheat is made at Niagara Falls and has association in the general opinion of the public with Niagara Falls.

I am familiar with the whole Wheat Biscuit manufactured by the Kellogg Company. We carry it in our store. I remember the dish in the picture on the end of the carton, Plaintiff's Exhibit 10. It has been used as long as I can remember. As long as I know the package, I remember seeing that on the package, and I have seen it in connection with other advertising matter of the Shredded Wheat Company.

The Shredded Wheat Company has been an extensive advertiser of its product, and the result of that advertising on the minds of the public is that, when it was advertised, it was more in demand.

When I receive an order from a customer for Shredded Wheat, I fill that order with Niagara Falls Shredded Wheat. If they ask for Shredded Wheat, I give them Shredded Wheat.

The picture of the two biscuits on Defendant's Exhibit No. 6 is similar to the picture on the Shredded

Wheat package and a person casually seeing that picture would figure it is the same as Shredded Wheat.

I identify the biscuit contained in Plaintiff's Exhibit 1. It has been exactly the same thing during the time that I have been familiar with it.

Grocers have remarked to me several times that they did not see how Kellogg could put out the same item as Shredded Wheat. The appearance of the Kellogg biscuit as contained in Defendant's Exhibit 6 is almost identical with Shredded Wheat, except that it is shorter than Shredded Wheat. Its shape is exactly similar.

If a woman is accustomed to buying Shredded Wheat right along, she would buy it according to the appearance of the package; but, if the grocer has not Shredded Wheat in stock and has Whole Wheat Biscuit instead, he will try to use his high-pressure salesmanship in selling Whole Wheat Biscuit, going so far as to open the package to convince her it was the same.

I would say it would be possible for a grocer to sell an unwary customer Whole Wheat for Shredded Wheat.

I carry the Kellogg product but very seldom sell it. The only time it sells is when they do specialty work from store to store and their salesmen come to our warehouse and take it to the grocer. That is the way most of the Kellogg stock moves.

The public in general ask for the product in Plaintiff's Exhibit 1 by asking for a package of Shredded Wheat. That is quite general.

The wholesale price of the Kellogg product is a trifle lower than Shredded Wheat. As to retail price, they can sell it two cents a package below Shredded Wheat.

CROSS-EXAMINATION.

THE WITNESS: I have known the Kellogg Company for quite a while, not as to the Whole Wheat Biscuit, but their corn flakes is an old item. Their reputation in the trade for fair dealing is very high.

I recognize the Whole Wheat Biscuit package shown me as being a distinctive Kellogg package, similar in color, shape, etc., to all the rest of the Kellogg family, such as corn flakes.

The high reputation of the Kellogg Company for fair dealing would help in introducing new products into the channels of retail trade.

The Kellogg Company is a very large advertiser of its product, ranking fourth or fifth among national advertisers of grocery products. I have seen advertisements of Whole Wheat Biscuit in newspapers, on car cards, store cards, and displays of that kind. All that sort of business depends on continued advertising. If either of the companies ceased to advertise, their business would practically vanish in four or five years time.

I would not be surprised and would credit the statement that two of the National Biscuit Company demonstrators who testified here a few days ago said they reached hundreds of people who had never tried Shredded Wheat before. The National Biscuit Company is digging up new customers of Shredded Wheat every day; and any idea that it is established for all time and would just roll along with no advertising is erroneous.

The Kellogg Company would have to do the same for Whole Wheat Biscuit, stir up the trade with specialty salesmen, and look for new customers.

I personally know of self-service stores, where a customer takes a basket and picks the goods out. I have not noticed whether they carry both the products.

If a customer asked for Kellogg's Shredded Wheat, I would send the Whole Wheat Biscuit. If anybody asked me what a shredded wheat biscuit was, I would describe it as a pillow-shaped biscuit, made out of whole wheat in shredded form. When I speak of being familiar with shredded wheat, I mean that type of biscuit, a shredded whole wheat biscuit in pillow-shaped form.

I would say that there has been very general knowledge through the grocery trade for several years that the Kellogg Company was making a shredded wheat biscuit. While, up to several years back, there has been competition with Shredded Wheat, it has been a product like it but smaller and a different shape altogether.

The Whole Wheat Biscuit is sold in distinctive Kellogg packages.

It is fair to say that a considerable proportion of people dealing with the grocery trade are experimental and like to try new products. Upon hearing of a new kind of shredded wheat on the market, there would be a tendency of most people to try it, to see whether they liked it better or whether it was different.

Constant advertising by the Kellogg Company of its Whole Wheat Biscuit would tend to arouse curiosity and interest in the new product on the part of many people.

"Whole Wheat Biscuit" or "Whole Wheat" would suggest to me any one of ten or fifteen kinds of products that would be all whole wheat.

If I looked at the Kellogg package without the picture of the biscuit on it and had never seen that before, I would not have any idea of what was inside. Whole Wheat biscuit might be in different shapes. National Biscuit Company's product, Uneeda Biscuit, is called a biscuit, and it is a soda cracker, an entirely different sort of thing from this. Quaker Muffets is

referred to on the carton as "Whole Wheat Biscuit," and is an entirely different kind of product from shredded wheat.

I know that the current name of a product like Uneeda Biscuit is soda cracker and rolled oats is oatmeal. There could not be any other name than shredded wheat biscuit or shredded wheat to describe Shredded Wheat, that product. Any other name that could be used for this whole wheat biscuit would not describe it, but shredded wheat or shredded wheat biscuit does describe it exactly.

It is a fact that the restaurant and hotel trade is usually serviced by and the great bulk of that trade is supplied through special hotel or restaurant jobbers.

My concern does not handle the individual type of carton of shredded wheat with two biscuit in the package. That would go through the restaurant and hotel jobbers.

I would say that Shredded Wheat and Shredded Wheat Biscuit of the National Biscuit Company and of the Kellogg Company are both subject to increasingly severe competition from other forms of whole wheat products, such as wheat flakes and puffed wheat; and, insofar as the public would be induced by advertising to use those other forms of wheat products, that would tend to affect the sales of shredded wheat.

In my opinion, the sale of shredded wheat by both the National Biscuit Company and the Kellogg Company or either of them is less rapid than it used to be. I attribute this to competition by other forms of whole wheat products, or what the public regards as more attractive forms, or new forms.

I regard the name "Kellogg's" on Defendant's Exhibit 6 as just as prominent as on the rest of the Kellogg family of packages, and that is as big as they

make their name. As far as those cartons go, Kellogg is the dominating name of the product.

It is a fact that it is a very common practice in the food line to put a dish on the package with some of the contents in the dish, whether it is spinach or baked beans, and it has been a common practice for a number of years to display a product in some attractive form in a dish on the package. That is a common advertising device to let the public know what the product looks like

I have not, in recent years, seen any package like Plaintiff's Exhibit 10, but I have seen packages with the plate on. In recent years, the package has been like Plaintiff's Exhibit 1, with a picture of Niagara Falls on each end, and the dish has vanished off the package.

I have not seen any of the Shredded Wheat packages like Plaintiff's Exhibit 148. On that exhibit, the words "Shredded Wheat" have been printed in red ink on both sides of the carton; whereas, in Plaintiff's Exhibit 1, the words "Shredded Wheat" are printed in red ink on the front face and in blue ink on the rear face of the carton.

Until about 1929, the National Biscuit Company just had a sort of cracker or biscuit line. It had no product like Shredded Wheat or shredded wheat biscuit. At about that time, it added the Shredded Wheat to the National Biscuit Line.

Since then, I have not heard of any attempts at the beginning to get the cracker line into grocery stores by saying, "If you want Shredded Wheat, you must buy the whole cracker line." I do not know anything about that either way.

The principal competitors of the National Biscuit Company, in the cracker line, are Sunshine, made by the Loose Wiles Biscuit Company. They have no shredded wheat product of any sort, that I know of. They have a cracker line and dog biscuits, Austins.

The National Biscuit Company have a dog biscuit, also, called Bennett's Milk-Bone.

It is a fact that a great many grocers carry the Loose Wiles Biscuit line rather than the National Biscuit Company's cracker line, for a particular reason. Some grocers are prejudiced against the National Biscuit Company. If they could not get the Niagara Falls Shredded Wheat except through the National Biscuit Company, it would be possible for the National Biscuit Company to say, "If you want Shredded Wheat, we want you to put in the National Biscuit line." That is mathematically true, but is not true in actual practice. I have not heard of it. I do not know anything about its being actual practice. I never heard of it.

I do know however that competition is very keen between the National Biscuit Company and Loose Wiles. I also know that many grocers would like to handle just one brand of each line. For instance, they would like, if they could, to have just one good brand of baked beans, and of shredded wheat biscuit and of corn flakes. They do not like to load up with two or three different kinds of corn flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I do not mean to be understood as saying that there are now two brands of shredded wheat. As I understand, there are two brands of shredded wheat biscuit. I wish to be understood as testifying that Kellogg is making a shredded wheat biscuit similar to the Shredded Wheat. I mean by that that the Kellogg wheat biscuit is similar to the Shredded Wheat, as to the looks and appearance of the biscuit that it sells, except for size.

When my customers refer to Shredded Wheat, they ask for it, and they get the item "Shredded Wheat." It is manufactured by the Niagara Falls plant.

Until the Kellogg Company put up its Whole Wheat Biscuit like Defendant's Exhibit 6, there was another cereal, in addition to Shredded Wheat, made of whole wheat and put up in biscuit form, called Muffetts, manufactured by the Quaker Oats Company, put up in a package like Defendant's Exhibit 11, made of whole wheat filaments similar to Shredded Wheat filaments. Muffetts could not be readily passed off as or confused with Shredded Wheat on account of the shape of the biscuit.

It is usual or customary in the trade, when one product has been carried in a picture on the carton, like Plaintiff's Exhibit 10, for another manufacturer of a similar product to feature his product in the same manner, two biscuit in a dish. I find that in other products besides Shredded Wheat, where one manufacturer imitates another.

I do not know, offhand, of any other product than Shredded Wheat and Kellogg's, where the manufacturer of a product illustrates the product on the package, putting it in a dish and another manufacturer has come along with a similar product and put it in a similar picture. That is the only one I have in mind now, Kellogg's and Shredded Wheat Biscuit, where the picture of two biscuit in a dish is substantially the same.

It is the custom of all cereal manufacturers to advertise extensively. I would attribute what I say as to some falling off in the distribution of Shredded Wheat wholly to the competition of other cereals and not partly due to the economic conditions generally in the country. The present economic depression has nothing to do with the falling off of sales.

The diminution of distribution of Shredded Wheat that I have noticed in recent years I would figure as about thirty per cent. Shredded Wheat has been a very steady seller for a great many years. It increased

regularly for many years in its distribution. It has been falling off for the past three or four years. That is a conclusion I would draw from my own experience. I do not know whether or not that is general throughout the country.

The proportion of people who are of an experimental type of mind, as contrasted with the portion of the purchasing public who prefer to continue with what they know is, I believe, about twenty-five per cent. of the people who use cereals. The others would be more or less conservative.

RE-CROSS-EXAMINATION.

THE WITNESS: I would say only a very small proportion of customers, like invalids, use Shredded Wheat year in and year out for any considerable number of years. Most people will use a product like that for just a year or so and then they will go to some other cereal; but there will be a few invalids or special cases who have had it prescribed and will eat it year in and year out. The great bulk of the people come in and out frequently. That is why concerns like the National Biscuit Company and Kellogg Company must advertise so constantly and give out samples, so as to constantly recruit users of their products, so that every time a user steps out, a new user will come in.

I know of other shredded food products, such as shredded codfish and shredded coconut.

In a line like baked beans, or canned spinach, or canned corn, I would say that there is an almost universal practice on the part of all those manufacturers of showing their product on a dish on the outside of the package.

I have not heard of Ross Shredded Wheat Biscuit.

If a customer asked for Kellogg's Shredded Wheat, I would send this Kellogg product, Whole

Wheat Biscuit. I would say that that would be a general practice in the trade.

From time to time, there have been a great many brands of corn flakes on the market made by different producers. That was probably truer some years ago than in recent years. Still, some of the large chain systems have their own brands of corn flakes. The common current name for that product is corn flakes. Many of those producers refer to the product as corn flakes or toasted corn flakes.

RE-DIRECT EXAMINATION.

THE WITNESS: I never heard of anyone taking what they call shredded codfish or shredded coconut and making it up into a pillow-shaped biscuit. It is usually just in bulk, loose in the package.

People like a variety in the cereals they eat and do not, as a rule, eat one constantly day in and day out. They have some variety.

RE-CROSS-EXAMINATION.

THE WITNESS: It is true that not all the customers of a grocer are set on any particular brand. They would specify the brand. In the majority of cases, they specify the brand. In the case of baking powder, they would be apt to say that they wanted Royal Baking Powder or Davis Baking Powder, or some other.

It is fair to say that people who had seen the Kellogg advertisement and had tried the Kellogg's shredded wheat, would say, "I want Kellogg's shredded wheat." And it is fair to say that, during practically the whole time that I have known this National Biscuit Company or Shredded Wheat Company's Shredded Wheat, I have known it as Niagara Falls Shredded Wheat; and Niagara Falls has always been associated with that product strongly, on the package

and in the advertising; so that, if anybody spoke of Niagara Falls Shredded Wheat, I would know instantly that they meant Shredded Wheat.

I would not say that it would be practically impossible for the Kellogg Company to expect to build up any kind of business by having the grocers just try to substitute its product, without explanation, for the Niagara Falls product. I would say that, if a person asked for the Niagara Falls Shredded Wheat and the grocer wanted to sell them Kellogg's, he would say, "Here is a new shredded wheat that we would like you to try," and that, if he did not do that, if he simply sent the Kellogg product on a telephone order, he would expect to have it come right back to him. The great bulk of the customers would send that product right back.

If the grocer would explain to some customers who asked for shredded wheat that the Kellogg Company was putting out a shredded wheat, that there are fifteen biscuit to the package, and that he would like them to try it, that would produce a certain number of customers who would try it, and they would know they were getting a new product. None of them would think he was getting the Niagara Falls Shredded Wheat. It would be true that a certain proportion of them would thereafter say, "I want Kellogg's Shredded Wheat." That is, they might. If they asked for Kellogg's, they would get Kellogg's. If they had tried the Kellogg product and found out that they liked it, they would, in re-ordering it, say, "Give me Kellogg's Shredded Wheat," no doubt.

I have never seen any of the small shredded wheat biscuit that the National Biscuit Company are putting out.

RE-DIRECT EXAMINATION.

THE WITNESS: In introducing or putting up Kellogg's Whole Wheat Biscuit, as defendant's counsel has just been asking me, it would be possible for the grocer to sell it as a substitute for Shredded Wheat or as a form of shredded wheat.

I never heard a customer ask for Niagara Falls Shredded Wheat, just in those words. They ask for Shredded Wheat. In answer to counsel's questions in which he spoke about Niagara Falls Shredded Wheat, I did not mean to infer that people ask for it in that way.

CHARLES E. DUNLAP.

Deposition taken in New York, January 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am controller of the National Biscuit Company and have been connected with the accounting department of that company since I took charge of that department in August, I think, of 1916. Since that time, I have been responsible for the methods of accounting of the National Biscuit Company and its subsidiaries. That is true of companies subsequently acquired, like the Shredded Wheat Company.

When the National Biscuit Company acquired the Shredded Wheat Company, it took over the accounts and books and all the records of that company, all the books of account and audited such books, which auditing was done by me and by assistants under my direction.

Included in those records and in the audit so made were records of annual sales of Shredded Wheat. I have had prepared, at Mr. Vilas' request a transcript of the sales of Shredded Wheat, by cases of thirty-

six packages, beginning with the year 1896 and concluding with the year 1932. The paper shown me contains that transcript, taken from the books of the Shredded Wheat Company and for subsequent years from the National Biscuit Company's books. Those books are under my control and the figures are correct, to my knowledge.

(Plaintiff's Exhibit No. 149.)

The records of expenditures for advertising, account of Shredded Wheat Company, have likewise been audited by me and kept in my department. I am familiar with Plaintiff's Exhibit 84. I have, at Mr. Vilas' request, caused the advertising expenditures in the United States to be abstracted from said exhibit and carried along in parallel columns by years with the figures in Plaintiff's Exhibit 149. The paper I now have before me is an absolutely correct transcript of those figures, combined from the two exhibits, and these figures have been used for our own purposes in figuring advertising costs per case for all those years.

(Plaintiff's Exhibit No. 150.)

CROSS-EXAMINATION.

THE WITNESS: Referring to the years 1929, 1930, and 1931, I have a star, with the footnote that these advertising totals do not include sampling and field expense; but that, in 1932, the total of \$973,581.76 includes three hundred thousand dollars for sampling. My reason for not including sampling in the 1932 total is the difference in the accounting methods, as between the National Biscuit Company and the Shredded Wheat Company.

The Shredded Wheat Company handled all of that through a special account; but, when the sales department of the National Biscuit Company took Shredded

Wheat in, it ceased to be handled from Niagara Falls, but was handled from here.

Wood was brought down here, and his men who were doing that same sampling work, which Shredded Wheat had done previously, were all handled on the sales department payroll. Without someone identifying each man and going back over all expense vouchers and seeing what part of their traveling expense and so forth was allocable to sampling work, it would be impossible to bring it in there without inflating those figures, if it was in there altogether. It is difficult to say how much, but I would say it probably would add three hundred thousand dollars to those figures; that is, for 1929, 1930, and 1931, those years that are low. While it is a fact that the field work and sampling were discontinued shortly after the National Biscuit Company took over the Shredded Wheat Company, it is not so much due to that as to the fact that we utilized those men in various ways and did not figure it was all a proper charge against advertising. We did our promotional work in a different manner.

I did not, in 1932, figure any expense for sampling crews. We did not have those crews in 1932. We went at it in a different manner. The three hundred thousand dollars for sampling in 1932 was for a special sampling campaign; covering the cost of the samples, and the cost of distribution through various concerns who make a specialty of that, such as the Postal Telegraph Company, and Campon & Company, over in Brooklyn. We believed it was cheaper to use people like that who had made a specialty of distribution and had the equipment. Then, when you had finished and were through with it, you were through, instead of having a lot of equipment on your hands. It would include the equivalent of salaries, but paid instead to the Postal Telegraph Company. We used whatever equipment they had, in the campaign.

The sampling was not kept up from 1929 down to 1932, and it was not resumed in 1932, which was a special campaign, along slightly different lines than the Shredded Wheat Company had done. It was a house-to-house sampling campaign, instead of having grocers put it in the baskets, as they used to do. It was not a full-sized package but a sampling package, with two biscuit in it, an individual sample, two biscuit to the carton. In one very limited locality, in the neighborhood of Fitchburg, Massachusetts, we had full-sized carton samples. Other than that, 90 per cent. of the sampling was individual-sized samples.

In Fitchburg, Massachusetts, there was an idea that there were some particular stores whose good-will had been lost for some reason I do not know; and the National Biscuit field representative recommended that we try it out, with the idea that it might be changed in the next sampling campaign. It was experimental. We bought from the groceries in Fitchburg, which was a more expensive form of sampling than the other; depending, of course, entirely on what results were secured.

Advertising expenditures on Niagara Falls Shredded Wheat are kept separate from the biscuit line of the National. There is no intermingling or overlapping of those expenditures in any way whatever. They were different crews. Our people had absolutely nothing to do with it, except to warehouse them, to be called for by these sampling crews. But the direct deliveries are made as joint, common deliveries. The same trucks or wagons pick up the cracker line and Shredded Wheat and make those deliveries.

Since the National Biscuit Company took over the Shredded Wheat Biscuit line, that product has mostly been distributed direct by the National Biscuit Company, rather than through jobbers or wholesalers; but,

of course, in some instances, we ship direct from the National Biscuit Company to the warehouse of the wholesaler or jobber. The great bulk of our delivery is now direct. There never was a time when the jobbers were absolutely cut off for a while; except that the effect of the taking over of the Shredded Wheat Company by the National Biscuit Company would naturally eliminate the jobbing business. If any jobber wanted to buy, however, he could always do it. In fact, we went after it. Not only could they do it, but we wanted it; that is, the two methods of delivery; our own trucking people and the jobber. The effect of our own delivery has naturally been to cut off the jobber in communities where we have quick service and delivery, if they want it. The jobbers may come and take orders here. I do not know how often. In that way, jobbers would regard our delivery service as in direct competition with them. I do not know whether they would consider it better service than their present service, or quicker; but they certainly would consider it competition.

I know, in a vague way of the marketing by the National Biscuit Company of a type of biscuit that is even smaller than the Kellogg Biscuit; that something of the sort was done some time back, I believe, for the restaurant trade; just as we bring out a Uneeda Biscuit for the restaurant trade and a graham for the restaurant trade. I do not know whether they are still on the market or not. I would not be surprised if Mr. Clarke told me that he bought some at the Union Station in Washington, within the last six weeks or a month, or that he could not. I do not know whether the National encourages or pushes the sale of its biscuit in individual cartons to restaurants. I am not in the sales end of it. All I am interested in is how much money we can make.

RE-DIRECT EXAMINATION.

THE WITNESS: What I have stated on cross-examination about the distribution of Shredded Wheat going away from the jobber and being done by the company would naturally result in a decreased volume by any jobber, in Shredded Wheat. It would be a rare exception if it did not. It would have to be some jobber who was located or had his business in such an isolated section that he practically controlled the business. I do not know of any such section in the country, today.

For instance, the effect of the National Biscuit Company's policy in the last three or four years would be to appreciably diminish the volume of a jobber in New York City who has been accustomed to handling Shredded Wheat in large quantities. With the National doing its delivery direct, I cannot see how the jobber could do any business, especially in New York City.

It is a fact that the National Biscuit Company, while still selling some Shredded Wheat through the jobber, does distribute it to the retail grocers direct, along with its crackers and other merchandise; so the National Biscuit salesmen who visit grocers and take orders for crackers also take orders for Shredded Wheat, just as if it were any other item of biscuit.

It is a fact that Shredded Wheat is now sold in bundles of twelve packages, and a grocer can buy a dozen packages without having to buy a whole case. Twelves, however, are not sold through jobbers. I do not say a jobber could not get twelves. I do not know of any reason why he could not have them if he wanted them; but I could not see how would want them.

RDQ. 70. Plaintiff's Exhibit No. 149 shows that, beginning in 1928, the curve of sales in cases appears to be declining. To what do you attribute that?

A. Well, there is no question; it is competition.

RDQ. 71. Competition of other cereals, do you mean?

A. Competition of Kellogg's Shredded Wheat, of which I am well aware.

RE-CROSS-EXAMINATION.

THE WITNESS: If Mr. Weinstock testified this morning that some of the falling off was due to competition with other cereal products made of wheat, I would have no way of contradicting that testimony, except that up to 1928 or 1929, along about that time when we acquired Shredded Wheat, there were just as many good cereals on the market as there are today. I do not see why competition of those same cereals or similar cereals—because there is a new one coming in and an old one going out all the time—could have had any more effect in 1928, 1929, and 1930, than it had previously.

I do not know whether the Kellogg Company was putting out its shredded wheat when the National took over The Shredded Wheat Company or not. That acquisition was at the end of 1928, 1929 being the first year that it was operated as a National subsidiary. That is my recollection.

I did not know that there was a suit pending by the Kellogg Company against The Shredded Wheat Company, Inc., prior to and in the early part of the year 1928, until after we had acquired Shredded Wheat, when I knew it in a very vague way. The only way I found out about it was that we had to make payments to a firm of attorneys. If we had not had to do that, I would not have known anything about it.

The reason for the National putting out bundles of twelves is not necessarily that wholesalers would break up the thirty-sixes and distribute them in small

lots to customers. In fact, it is not the prime reason, as I understand it. I do not know about the wholesalers selling to retail merchants in less than thirty-six-package cases. I know that our reason for putting it out in the smaller package was so that the smaller stores would have fresher stocks.

I do not know whether the jobber would break the case; but, if he did, then our service would be somewhat paralleled by the wholesaler; except that he would destroy the keeping qualities by breaking it up. The case helps to preserve the packages. I would not think that the wholesaler would break a case and sell twelve of them if the other twenty-four were going to remain on his shelves very long.

I would have to refer to my records, but it is my recollection that, in the year 1932, there was a falling off of about 248,000 cases over the preceding year in the sale of Niagara Falls Shredded Wheat, according to Plaintiff's Exhibit 149. If that figure is about 11 per cent., I guess it is right.

WILLIAM E. MACKAY.

Deposition taken in New York January 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am a law student connected with the legal department of the National Biscuit Company.

I am a user of Shredded Wheat and have had occasion to order it in a restaurant recently. About ninety-three on the evening of October 3, 1932, I went into a restaurant called the Hanover Cafeteria, on Lexington Avenue between Fortieth and Forty-first Streets, and asked for Shredded Wheat. I turned my back and looked around the restaurant. When I turned around again, the clerk was opening this package of Kellogg's and turning out the Whole Wheat Biscuit.

I said, "That is not Shredded Wheat." He said, "Yes, this is Shredded Wheat." We had some other conversation. I said, "That is not the kind of Shredded Wheat I know." He said, "Yes, this is Shredded Wheat. It is a new kind. It is much better than the old." That is the substance of our conversation. I accepted the product. The carton now before me is the carton that the biscuit was taken out of at that time.

(Plaintiff's Exhibit 151.)

CROSS-EXAMINATION.

THE WITNESS: When I said that, I meant that it was not Shredded Wheat. I did not mean by that to tell the clerk that it was not a wheat product that I got. I simply meant to tell him that it was not Shredded Wheat—at least, what I had in mind when I asked for Shredded Wheat. I really do not know what the Kellogg product is. I have looked at it, and, judging by the appearance, I would say that it was a wheat product. I do not know how it is made. I do not know by appearance whether there are shreds in it or not. I know that our product is made of shreds. I do not know how the Kellogg product is made. Judging by the appearance of it, it looks that way. It is a noticeably shorter biscuit than the Niagara Falls biscuit; but it is generally a pillow-shaped biscuit; it is similar.

I knew what the clerk was trying to convey to me when he said that this was a shredded wheat product made by a new concern. He was trying to tell me that it was physically a shredded wheat biscuit, but that it was made by the Kellogg Company.

Sometimes I go into a restaurant at night and order Shredded Wheat before going to bed. When I am handed any of the Kellogg's products, it is not my practice to say "Oh, that is not Shredded Wheat." I might do it, though. Being associated with the Na-

tional Biscuit Company, I might engage the attendant in conversation about it. I would try to boost my own company's product. I would not go into any statement that the Kellogg's product is not a shredded wheat product, I think, with an attendant or waitress, because that sort of conversation does not usually mean much to them.

This restaurant was a cafeteria. You go up to the counter and ask for things at the counter. He got the package from underneath the counter, I believe. I turned around, and, when I turned back again, he was opening this package. That was in my full sight. I knew right away that it was not the Niagara Falls Shredded Wheat that I had been accustomed to getting.

I have known that the Kellogg people had a package like that on the market since June of 1932, when I became connected with the legal department of the National Biscuit Company.

I had another experience in the same place in just the same way, when they took the package from under the counter and started opening it up. In that case, I ate the Kellogg product. It tasted harder, more brittle, and not so palatable as the Shredded Wheat. I do not remember exactly what it tasted like. I remember it was harder and more brittle, as if it were baked more and more brittle.

CHARLES T. WARD.

Deposition taken in New York, January 11, 1933.

DIRECT EXAMINATION.

THE WITNESS: I am president of Francis H. Leggett & Company and have been connected with them for forty-two or forty-three years. They are in the wholesale grocery business, being wholesale distributors of food, also manufacturers. We have been, during that entire period, distributors of cereals and other foods.

I am familiar with the product known as Shredded Wheat, having known it about thirty years. Our house has handled it during that time. The term Shredded Wheat means to me a proprietary item of some sort, or brand, owned by the Shredded Wheat Company formerly, I think, and now by the National Biscuit Company.

By the term "proprietary article" I mean to convey some item that is owned individually by somebody. I have been familiar with the appearance of the Shredded Wheat package and with the article itself.

I recognize the package, Plaintiff's Exhibit 1; and the contents thereof. I would say that, during my knowledge of it, the appearance of the biscuit known as Shredded Wheat Biscuit has remained substantially the same as I see it in this package, in every way.

We have orders for this item, in my experience, from time to time. They ask for it as Shredded Wheat. When a customer asks for Shredded Wheat, we supply that item, Shredded Wheat, Plaintiff's Exhibit 1, the only one I know of, that Shredded Wheat right there.

From my experience as a merchant in dealing with the purchasing public, I would say that, undoubtedly, the expression "Shredded Wheat" has a definite meaning to the public generally. It means that Shredded Wheat there, Plaintiff's Exhibit 1.

I am familiar with the fact, also, that the Shredded Wheat Company has extensively advertised the product for a good many years, and the effect of that advertising has been to identify it as a proprietary article.

In my opinion as a merchant, I do not think there is any question in my mind about the fact that the advertising and the sales of Shredded Wheat, as I know it, resulted in identifying Shredded Wheat as a proprietary article.

I am slightly familiar with the Kellogg's Whole Wheat Biscuit. We carry that, also. I recognize the package, Defendant's Exhibit 6. If the name were obliterated on that package and I could see only the picture on the package, I would think it was more or less of an imitation of Shredded Wheat.

Q. 33. Look at the biscuit contained in Defendant's Exhibit No. 6, which is the Kellogg's biscuit.

A. Yes.

Q. 34. What do you say as to the appearance of that biscuit, as compared with the Shredded Wheat in Plaintiff's Exhibit No. 1?

A. Well, do you mean the impression it gives me?

Q. 35. Yes.

A. Or the physical difference?

Q. 36. No, the impression you get from it.

A. Why, I would think it was made to imitate Shredded Wheat.

THE WITNESS: It is a similar shape, a little different, and of similar appearance as this pillow-shaped biscuit, and is made of what appears to be threads or shreds of wheat. It is a little different in size.

CROSS-EXAMINATION.

THE WITNESS: I would not identify Kellogg's product, Defendant's Exhibit 6, with what I know as Shredded Wheat Biscuit. I do not think I am qualified

to answer as to whether it is just as much a shredded wheat biscuit as this product from Niagara Falls. Do you not think it would take an expert to tell that?

I have talked to Mr. Vilas about this before I came upstairs. We discussed this matter of proprietary products in general but not so carefully before I came up. Mr. Vilas asked me a lot of questions about it. It means only the Niagara Falls product to me, Plaintiff's Exhibit 1.

Shredded Wheat means nothing to me but that product right there made by those people. I could not possibly identify it except by that.

If people asked me what a shredded wheat was, I could tell them it was a biscuit made of wheat. I could not tell them it was made of wheat run out into shreds, because I have never seen it manufactured. I would identify it with Plaintiff's Exhibit 1, in my mind; that package right there. That is the only one, in my mind, Plaintiff's Exhibit 1. That (referring to Defendant's Exhibit 6) looks like an imitation to me. By that I mean I think it is something calculated to deceive whoever buys it. I cannot identify that as a wheat product. I cannot look at a thing and say "It is made out of wheat." I am not a cereal expert. How can I say that.

I say the product in Plaintiff's Exhibit 1 is Shredded Wheat. I have no doubt about that being what they say it is, from the long period of advertising of the product that I have seen in the magazines, of their advertising. It is good advertising.

XQ. 58. Have you any doubt about its being shredded?

A. Well, if that is what you call shredded, it is shredded.

XQ. 59. Does not the word "shredded" mean anything to you?

A. As shredded wheat, yes. If you associated "shredded" and "wheat," there is only one thing that

comes to my mind, and that is that biscuit right there, Plaintiff's Exhibit 1. If I went into a hotel or restaurant and asked for Shredded Wheat, I would expect that thing right there, that I have seen for years.

If we got an order for Kellogg's Shredded Wheat, we would say that we do not have such a thing as Kellogg's Shredded Wheat. We would not argue with anybody. In the way we do business, if a man would order a case of Shredded Wheat, he would get that, Plaintiff's Exhibit 1. If the salesman were taking the order, he would not take that for Shredded Wheat. Any of our salesmen would know better. But, if an open order came to us for Shredded Wheat or Kellogg's Shredded Wheat, they would get that for Shredded Wheat, Plaintiff's Exhibit 1. In Kellogg's, we do not have any such thing as Shredded Wheat; it is a Whole Wheat Biscuit.

If an order came to us for Kellogg's Shredded Wheat, if it was an order for Shredded Wheat, and we thought that they wanted Shredded Wheat, that is what they would get, Plaintiff's Exhibit 1.

If an open order came to us for Kellogg's Shredded Wheat, we would undoubtedly send it back. I would ask him if he wanted Kellogg's Whole Wheat Biscuit or Shredded Wheat. That is probably what would happen. Until he returned the order to me as Kellogg's Whole Wheat, it would not occur to me that he would want the Kellogg product. If he said Shredded Wheat, including Kellogg's, I would think he was mistaken and wanted Shredded Wheat.

If I had the product as named on Defendant's Exhibit 5 for identification in stock and an order came for Kellogg's Shredded Wheat, I would deliver, undoubtedly, Shredded Wheat; no question about it. That is Kellogg's Shredded Whole Wheat Biscuit. Now, if a man asks for Shredded Wheat and associated the name

of Kellogg or any other name with it, I would think they wanted that, Plaintiff's Exhibit 1. And we would go back and find out what he had been getting. If it was Shredded Wheat that he used before, that is what he would get.

If we were carrying Kellogg's Shredded Whole Wheat Biscuit, and he would send in for Kellogg's Shredded Wheat, we would not fill that order. We would think he was mistaken somewhere in his mind.

I would imagine we carried the Kellogg's Shredded Whole Wheat Biscuit at some time. I have no idea. I am president of Francis H. Leggett & Company. There are thousands of orders come in there. I do not know every order that comes in. But, if there was an element of doubt as to what the man wanted, we would not ship it. If a man said Kellogg's Shredded Wheat, we would think he had that in mind, Plaintiff's Exhibit 1; so we would raise the question to find out. No experienced salesman of our own would send in an order for Kellogg's Shredded Wheat. If he wanted Kellogg's Whole Wheat Biscuit, that is what he would specify.

I do not know how many different brands of corn flakes we carry. I know there are several. We have our own brand, Premier Corn Flakes. It never has occurred to me that there was anything unfair about that, as far as the Kellogg Company was concerned.

I do not know that, in ninety-nine cases out of a hundred, when people ask for corn flakes, they mean Kellogg's. I will tell you, for your own information, that probably the first people to use the word "Flakes" in this country were the Leggett & Co. people. It used to be known as *rolled oats*, and we coined the name, or so we thought, as "Oat Flakes." So Kellogg's does not have any priority to the word "flakes." Corn flakes simply means a cereal.

The Kellogg Company may have tried to establish proprietary rights in toasted corn flakes in suing the Quaker Company. I have never seen any papers on it that I know of.

I would say there are more brands of corn flakes today than there were ten years ago. Among certain people, the non-proprietary name of the Uneeda Biscuit is soda crackers. I suppose some people call it biscuit. Oatmeal is not referred to as rolled oats by anybody who knows the difference. If you take an oat and roll it, it becomes what we call a flake; whereas oatmeal is oats ground up, some fine, some coarse, and some medium. It is not sold in a meal.

The only name that is associated with Plaintiff's Exhibit 1, in my mind, is the proprietary name, Shredded Wheat. If I were in America and asked for a non-proprietary name of Uneeda biscuit, I would say that it was a soda cracker or a saltine cracker, I guess; but, if I were in England, I would probably call it a biscuit. Soda cracker would be a non-proprietary name for Uneeda Biscuit, a name that everybody or anybody would use. I cannot suggest any name like that for Shredded Wheat Biscuit. I know it simply as Shredded Wheat. That is the only name for it, for ever a period of thirty years, at least. During that time, I have never known of any other manufacturer of shredded wheat biscuit, except the Niagara Falls Company. I never heard of the Ross Biscuit. I do not think I ever heard of the Williams Biscuit. The reason I say Plaintiff's Exhibit 1 is Shredded Wheat is that that is the only concern I have heard of. Based upon my experience, I should think they have a monopoly on all biscuit in that form. The competition of corn flakes is quite different. There is no comparison between corn flakes and shredded wheat. Shredded Wheat is single. There are hundreds of brands of corn flakes.

I know only one manufacturer of Shredded Wheat; that is the Shredded Wheat Company of Niagara Falls. Their successors are still making it. Because no other manufacturer has made that for a number of years, I would not think that any other manufacturer could properly make it or lawfully make it.

I think we handle the other Kellogg's products, like corn flakes. To be positive, I would have to go and see the stock; but I will say yes. I am pretty sure of it. I will change that and say we do handle them, Kellogg's Corn Flakes.

I would also say that Francis H. Leggett & Company handle some of the other Kellogg products: Whole Wheat, Bran, Pep and several like it.

To my knowledge, I think the Kellogg Company have been quite unfair in their dealings with the grocery trade. Many years ago, we, like others, had a corn flake; and they sent out bulletins, at a time when a man named Murphy had charge of their sales, saying it was unfair for another jobber to have a corn flake. I think that was decidedly unfair. It did not leave any feeling in my mind; but I think it was unfair. I did not, at that time, regard it as wrong for wholesalers to be, at the same time, pushing a manufacturer's brand and a private brand of their own. All the people in the trade would not agree with me on that, and I do not want them to.

We carried Niagara Falls Shredded Wheat at that time. We still sell it. I could not tell you what the policy of the National Biscuit Company is as to distribution direct. I know we handle it, like many other jobbers. I do not know anything about their cutting the wholesalers out by distributing it to the retail trade direct or giving better service. I do not know what the sales of Niagara Falls Shredded Wheat are, as compared with what they were. It could have fallen off

twenty-five or thirty per cent. or increased the same amount, and I would not know it.

There is not usually a special type of jobber or wholesaler who services hotels and restaurants. Our men, some of them, have both hotels and restaurants. They generally handle that trade in the same way and at the same time. A man might call on a retail grocer at this corner and there might be a hotel customer right around the corner. I know that of my own personal knowledge

I do not know whether Francis H. Leggett & Company carry either the Kellogg's or the Niagara Falls Shredded Wheat in individual cartons. If there is a demand for Shredded Wheat in the individuals, we surely have it. I do not know whether we carry them or not; but, if there is a demand for it, we do carry it. We carry everything there is a demand for.

I have never identified Kellogg with Shredded Wheat, by any means. I have known of Kellogg's Whole Wheat product, I would say, just a few years. If anybody asked me now whether or not more than one concern was making this shredded wheat biscuit, I would still answer that there is only one Shredded Wheat, in my opinion. I would have to answer there is only one known as Shredded Wheat. My answer still would be that there is only one concern making shredded wheat biscuit.

My idea is that the words "Shredded Wheat" are a proprietary trade-mark; although the package is marked "Reg. U. S. Pat. Off."

I do not know anything about any falling off in demand for Shredded Wheat. I would not know if it had increased or decreased thirty per cent.; although, if there was any decided falling off of Shredded Wheat, the probabilities are that the buyer of that department might say something to me about it.

I do not think I have ever seen Kellogg's Whole Wheat Biscuit advertised. I study the grocery trade business pretty carefully; but I do not think I have ever seen any newspaper or magazine advertisements of Kellogg's or any in grocery stores or any car cards or store cards.

I have seen the Niagara Falls Shredded Wheat advertised in magazines. I do not think I have ever seen any car cards or store cards or anything like that. I may have; but I do not think I have ever seen it in any store. I am not very apt to go around in retail stores.

There is no objection in our concern as a general policy, to have more than one kind of a proprietary product, as many kinds as there is a demand for. I would not think there was an objection among the grocers. I would not be surprised if grocers had testified here that they would like just one kind of corn flakes, one kind of white flour, and so forth. I think they would be very foolish to testify that way, if there was a demand for more than one. I think a man who is a good merchant is foolish to take that stand, if there is a demand for something else. I think that, as a good grocer, he should welcome any additional brands that there is a demand for.

I do not favor monopoly. I do not consider Shredded Wheat as a monopoly. If there is only one concern entitled to Shredded Wheat who may manufacture it and distribute it, I do not think that is a monopoly, Shredded Wheat. I think they are entitled to it. Shredded Wheat means only one package, to me, only one thing, and that is Plaintiff's Exhibit 1.

I would not consider it an absolute monopoly if the National Biscuit Company would be the only concern in the country that could make this pillow-shaped article and call it Shredded Wheat. I would consider

this Kellogg product, put out under the name of Whole Wheat, as an imitation. I would think that it is unfair for them to put it out as shredded wheat, Whole Wheat Biscuit. I do not think there is anything unfair as to the name, Whole Wheat Biscuit; but I certainly do with respect to the style of package. I think that is a very deliberate way of imitating Shredded Wheat. If they did not, they would have put it in some other shape. They must have thought there was some value to putting it out that way.

I would have to see both our package of corn flakes and the Kellogg Company package of corn flakes to know whether they differ in shape. If they were or were not, it would not make any difference to me. I would not regard that as an imitation of anybody else's package. I do not think that makes very much difference.

I would not call the Kellogg Whole Wheat package a fair package. In the second place, it is, in my opinion, an imitation package. If Kellogg had something good, he would give it an entirely different name. I could suggest a package for that product other than a rectangular package. For instance, put it in a round package, if you want, like the Muffetts. You could put them in that. That is one shape. It would not be so close a following of that one, the first one there, Plaintiff's Exhibit 1.

I have heard of such products as shredded codfish and shredded coconut. The original shredded codfish was Beardsley's. Shredded codfish is codfish drawn into small shreds, torn apart, in bulk and in packages. Shredded coconut is the same thing, torn apart. Neither one of them would resemble that, however, as a shredded product. You can call them shreds if you want to.

RE-DIRECT EXAMINATION.

RDQ. 215. Let us just go a little bit further in comparison of these packages. In response to Mr. Clarke's cross-examination, I think you said that you still regarded Defendant's Exhibit No. 6 and the biscuit in it as an imitation of Shredded Wheat. Now, you were examined at length upon the question of fairness and unfairness. I ask you to look at Plaintiff's Exhibit No. 147. I call your attention, in the first place, to the window on the front of it, showing the ends of the biscuit. I call your attention to the legend on one end of the package, "Kellogg's Whole Wheat Biscuit; Shredded Wheat in its most delicious form," and, on the other end, "Kellogg's Whole Wheat Biscuit, a shredded wheat product." What do you have to say as to the fairness or unfairness of that package, as compared with the plaintiff's package?

A. Taking in both sides of the panel and the window front, and the printed statement and the two sides there, I think it was intended to create the impression that it was the original Shredded Wheat, like that that you have over there, Plaintiff's Exhibit No. 1.

RE-CROSS-EXAMINATION.

THE WITNESS: I would not attach any significance at all to the word "Kellogg's" on the package. I would assume that you follow it with significance as to what I just testified to there as Shredded Wheat.

With regard to a distinction between the imitation and the thing itself, I would not look at something that was not an automobile and tell you that that was an automobile and say that it was an imitation. If it were a child's automobile and it looked like a big automobile, I would call it a toy.

With regard to Shredded Wheat Biscuit, I have always known that one, Plaintiff's Exhibit 1, as Shredded Wheat. It is what I consider a proprietary name owned by the Shredded Wheat people. I do not know Defendant's Exhibit 6 as Shredded Wheat; although I do say that the shape and the wording here would tend to deceive me that it might be the Shredded Wheat that I have always known as Shredded Wheat. I say it looks like an imitation. I would not think it was the same thing as Shredded Wheat. It certainly does look a little different to me. The shape is different, I think. And I think you will find that yours is toasted on both sides, and Shredded Wheat is not. In those respects, I regard it as tending to make one think it is Shredded Wheat, which, in my opinion, it is not.

If I got hold of the specifications of machinery, with my manufacturing ability, I could turn out a biscuit which would be a shredded whole wheat biscuit; but I would not do it that way. Legally, if I could do it. I do not think I could turn out a shredded wheat biscuit. I would not turn that out and call it shredded wheat biscuit. I can assure you of that. Even if I could, I would not.

Mr. Clarke says that the product in Defendant's Exhibit 6 is not an imitation, that it is shredded wheat biscuit. I will not concede that it is shredded wheat. If anybody asked me what a shredded wheat biscuit is, I would have to tell them that that is the only Shredded Wheat Biscuit that I know, Plaintiff's Exhibit 1. I base that on at least twenty-five or thirty years contact with that item. At one time, I was a buyer of Shredded Wheat. If anybody came to me with that and told me that was Shredded Wheat, I could not believe it, referring to Defendant's Exhibit 6.

RXQ. 235. But it looks like an imitation of shredded wheat, you say, and not shredded wheat itself?

A. I would say it was an imitation of Shredded Wheat.

RXQ. 236. By "imitation", you could conceivably mean the same thing under another name?

A. No, I would mean something that was gotten up tending to deceive, to mix the buyer up.

RXQ. 237. Suppose I told you frankly that the Kellogg Company was trying its best to make a shredded wheat biscuit; would you doubt that it could do it?

A. Well, I do not know whether they could or not. I suppose the verdict in this case will show whether you can or not. But I will say that, according to my notion, I should think they could not call it Shredded Wheat. And I think, if they called it Shredded Wheat, they were trying to get the benefit of what I call Shredded Wheat.

That one there, Plaintiff's Exhibit 1, is the only one that I know as Shredded Wheat, by seeing it, by eating it, by seeing it advertised, and by buying and selling it, and, when that comes along, Defendant's Exhibit 6; I cannot place that as Shredded Wheat. I say it looks like Shredded Wheat. It would not fool me, between the two, for a moment. Assuming that that is Kellogg's, I would know that that was not, to my mind, Shredded Wheat, that I have learned after all these years of contact.

RE-DIRECT EXAMINATION.

THE WITNESS: Kodak is a camera made by the Eastman people. If somebody else, a stranger to Eastman, manufactured a camera and called it a kodak, it would not, to my way of thinking, be a Kodak. I know what a Cadillac is, a kind of automobile. If somebody else should make a car that would look like

a Cadillac and should call it Cadillac, it would not, to my mind, be a Cadillac.

Somebody might make a biscuit out of wheat and make it look like the biscuit, for instance, in Defendant's Exhibit 6, the Kellogg package here. In my opinion, however, it would certainly not be Shredded Wheat.

The biscuit taken from Plaintiff's Exhibit 1, Shredded Wheat, has, to the best of my recollection, always been of similar appearance, the same size, shape, and appearance. That has been the same for many years, as I can remember it.

RE-CROSS-EXAMINATION.

THE WITNESS: Kodak is a camera identified with Eastman. If I would think of Kodak, I would think of two things: Eastman and camera. If I contemplated going into the camera business, I could call my camera a Ward's camera. I think I would go to the same lengths on Eastman. I would call it Kodak. And I would call it Filmo; but, if either of those two were meant, you would not call them the one thing. I know a Kodak is a camera, and I know it is an Eastman's Kodak, but it is a camera. If you would say you had your Filmo, I would know you were talking about a camera made by the Filmo people.

I think the National Biscuit Company has established a name for their own product. They have established "Uneeda" for their soda cracker. I would look upon Shredded Wheat as a descriptive name. It was a name which was intended to be a descriptive name. I think, originally, in the minds of the people that started that, they had coined the proprietary words "Shredded Wheat". I think Shredded Wheat is a proprietary brand. A descriptive name for Plaintiff's

Exhibit 1; you have it, Shredded Wheat. I think it is a proprietary brand, Shredded Wheat. The name is descriptive, that it is made of wheat. I think you could coin a descriptive word for that. Yes, you could coin another proprietary word. For a descriptive word, I would have to go to work and do a lot of things if I wanted to establish that as Shredded Wheat.

Leaving off the trade name or trade-mark, I cannot suggest any other descriptive name for that product.

RE-DIRECT EXAMINATION.

THE WITNESS: Except that it is made out of wheat. It does not tell me what kind of wheat, either. It might be soft or hard; I do not know.

RE-CROSS-EXAMINATION.

THE WITNESS: It might be whole wheat, or it might be wheat with something taken out. It could not possibly be wheat in shredded form. I do not know what process it goes through in the making of it. I have not the remotest idea.